EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 6123

United States Circuit Court of Appeals

For the Ninth Circuit.

STEVE STANWORTH and MRS. STEVE STANWORTH,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Territory of Alaska, Division Number One.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 6123

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

GEORGE B. GRIGSBY, Esq., Ketchikan, Alaska,
Attorney for Appellant.

HOWARD D. STABLER, United States District Attorney, Juneau, Alaska,
Attorney for Appellee.

#2023-B.

INDICTMENT.

Section One, Alaska Bone Dry Law—Section 21, Title II, National Prohibition Act.

United States of America,
District of Alaska,
First Division,—ss.

COUNT ONE.

In the District Court of the United States, in and for District of Alaska, District aforesaid, at the Special August Term thereof, A. D. 1929.

The Grand Jurors of the United States, impaneled, sworn and charged at the term aforesaid, of the court aforesaid, on their oath present, that STEVE STANWORTH and Mrs. STEVE STANWORTH, at Juneau, Alaska, on the 25th day of October, in the year 1929, in the said division of said district, and within the jurisdiction of said court, did knowingly, wilfully and unlawfully have in their possession and under their control, about

nine (9) gallons of moonshine whisky and one quart of Gordon's Dry Gin, which was then and there fit for use and intended for intoxicating beverage purposes and which possession as aforesaid was then and there in violation of Section One of the Alaska Bone Dry Law (39 Stat. 903, Chapter 53), *and* contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

HOWARD D. STABLER,
United States Attorney. [1*]

COUNT TWO.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present, that the said STEVE STANWORTH and Mrs. STEVE STANWORTH, at Juneau, Alaska, on the 25th day of October, in the year 1929, in the said division of said district, and within the jurisdiction of said court, did knowingly, wilfully and unlawfully, at and in a building numbered 95 to 95½ Front Street, keep and maintain a common nuisance, to wit, a place and building where intoxicating liquor was sold, kept and bartered in violation of the National Prohibition Act, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

HOWARD D. STABLER,
United States Attorney. [2]

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*Page-number appearing at the foot of page of original certified Transcript of Record.

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 2023.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

STEVE STANWORTH and MRS. STEVE STANWORTH,
Defendants.

COURT'S INSTRUCTIONS TO THE JURY.

The COURT.—Ladies and Gentlemen of the Jury: I instruct you as follows: [3]

No. 1.

The defendants are on trial before you under an indictment charging two separate offenses against each of said defendants. The first offense charged is that of the possession of intoxicating liquor, and the second is that of keeping and maintaining a common nuisance.

The defendants have plead not guilty to both offenses, whereby it becomes incumbent upon the Government to prove each and every material allegation of said offenses beyond a reasonable doubt as against each defendant before said defendant can be found guilty thereunder. [4]

No. 2.

If you find beyond a reasonable doubt that either

of these defendants did on or about the 25th day of October, 1929, at Juneau, Alaska, wilfully and unlawfully possess the intoxicating liquor designated in Count One of the indictment, or any part thereof, or did aid, abett or assist the other defendant in possessing said intoxicating liquor or any part thereof, at Juneau, Alaska, then you should find such defendant guilty under Count One of the indictment. If you do not so find, then you should acquit such defendant under Count One of the indictment. [5]

No. 3.

Under Count Two of the indictment, if you find beyond a reasonable doubt that either of these defendants did, on or about the 25th day of October, 1929, at their premises on Front Street, Juneau, Alaska, wilfully and unlawfully keep and operate a place where intoxicating liquors were kept and possessed for intoxicating beverage purposes, or that either of said defendants did then and there aid, abett or assist the other in maintaining, keeping or operating a place where intoxicating liquors were kept and possessed for intoxicating beverage purposes, then you should find such defendant guilty under Count Two of the indictment. If you do not so find then you should acquit such defendant under Count Two of the indictment. [6]

No. 4.

It is not necessary for you to find that the offenses charged were committed on the precise date charged in the indictment. It is sufficient if you find that

they were committed at any time within three years prior to the finding of the indictment.

It is not necessary that the Government show the possession of the exact amount of liquor charged in the indictment. It is sufficient if any of the intoxicating liquor alleged to have been possessed is shown beyond a reasonable doubt to have been unlawfully possessed. [7]

No. 5.

You are instructed that all persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the crime or aid and abet in its commission, though not present, are principals, and are to be tried and punished as such. [8]

No. 6.

Intoxicating liquor is defined by Section One of the National Prohibition Act as including whiskey. The character of any liquor or liquid, as to whether or not it is whiskey may be shown by tests of witnesses, from their experience, taste, smell, or other recognized means of analysis. Whiskey is an intoxicating liquor fit for beverage purposes and the Government need not show its alcoholic content. [9]

No. 7.

Possession means dominion or control over an object. It may include the actual manual possession of such object or constructive possession, by which is meant having the object under one's custody or control with the present right or power to

control or dispose of it. Ownership is not an essential element of possession, but in order to constitute possession without ownership the person charged with the possession of intoxicating liquor must know that such liquor has been left with him and must understand he is in charge or control thereof with power to dispose thereof.

As used in the indictment in this case, "wilfully" means knowingly and intentionally, as opposed to accidentally.

"Unlawfully" means without legal justification. [10]

No. 8.

The indictment is a mere accusation or charge against the defendants and is not of itself any evidence of their guilt, and no juror should permit himself to be influenced against the defendants or either of them solely because an indictment *is* been returned against them. [11]

No. 9.

The law presumes every person charged with crime to be innocent. This presumption of innocence remains with the defendants throughout the trial, and should be given effect by you until by the evidence introduced before you you are convinced of the defendants' guilt beyond a reasonable doubt. This rule as to the presumption of innocence is a humane provision of the law intended to guard against the conviction of an innocent person; but it is not intended to prevent the conviction of any

person who is in fact guilty, or to aid the guilty to escape punishment. [12]

No. 10.

Evidence of the good reputation of the defendants as law-abiding citizens has been introduced. It is the duty of the jury to consider such evidence and all the other evidence in the case, and if, upon a consideration of all the evidence, including that of good reputation of the defendants as law-abiding citizens, the jury entertain any reasonable doubt of the guilt of either defendant, it is their duty to acquit such defendant; but if, after considering all the evidence, including that of good reputation as law-abiding citizens, you have no doubt of the guilt of such defendant, it is equally your duty to convict such defendant, notwithstanding any such good reputation such defendant may have had. [13]

No. 10½.

Under the first count of the indictment herein, namely, the count charging possession of intoxicating liquor, the evidence is circumstantial.

No greater degree of certainty is required where evidence is circumstantial than where it is direct. In either case the jury must be convinced of the defendants' guilt beyond a reasonable doubt before you reach a verdict of guilty.

The law makes no distinction as to the degree of proof required between direct evidence of a fact and evidence of circumstances from which the existence of a fact may be inferred. In order that you may be warranted in finding the defendants guilty,

all the facts and circumstances necessary to establish the conclusion of guilt, and each of said facts, must be proved beyond a reasonable doubt, and such facts and circumstances must be consistent with each other and with the conclusion sought to be established, which is that the defendants committed the crime as charged; but if there is any other reasonable theory consistent with all the facts before you and also with the innocence of the defendants, then you must find the defendants not guilty.

To warrant a conviction upon circumstantial evidence the proved circumstances must exclude beyond a reasonable doubt every hypothesis but the single one of guilt, but if all the circumstances taken together convince your minds beyond a reasonable doubt that the defendants committed the crime as charged, then you should find them guilty. [14]

No. 11.

The words "reasonable doubt" mean in law just what the words imply—a doubt based upon some good reason. It does not mean a mere whim or a vague, conjectural doubt, or a misgiving founded upon mere possibilities. The jurors should understand and distinguish the difference between a proof beyond a reasonable doubt and proof to the exclusion of a mere vague or possible doubt, or to an absolute certainty. The Government is not required to satisfy you of guilt to an absolute certainty, but you are required to be satisfied to a moral certainty. You are not to understand from anything that has occurred during the trial, or

from anything the Court has said to you, or says to you in these instructions, that the Court believes the defendants guilty or innocent. This is not the province of the Court. This is your province. You are responsible on your oath and on your conscience. You must not go outside of the record to find reasons for conviction; neither must you go outside of the record to hunt for reasons for a doubt. A A reasonable doubt is one that must arise from the evidence or lack of evidence in the case, and it must be a substantial doubt, such as an honest, sensible, fair-minded man might with reason entertain consistently with a conscientious desire to ascertain the truth. You must use your common sense as men and women of experience, possessing some knowledge of worldly affairs, and if, after examining carefully all the facts and circumstances in the case, you can say and feel that you have a settled and abiding conviction of the guilt of either defendant, then you are satisfied of guilt beyond a reasonable doubt. If you have not such a conviction then you should acquit. [15]

No. 12.

In determining the credit you will give to a witness, and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand, the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties in the case; the probability or

improbability of the statements of such witness; the opportunity he had to observe and be informed as to matters respecting which he gave testimony before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge. [16]

No. 12½

I wish to make it clear to the jury in this case that you are not to consider the question of the legality or illegality of the search of the defendants' premises on October 25th. That is a matter of law to be raised as such, and determnied by the Court and for the purposes of this case you are instructed that you should consider the search of said premises a legal search. [17]

No. 13.

The Code of Alaska provides that all questions of law, including the admissibility of testimony, the facts preliminary to such admission and the construction of statutes and other writings and other rules of evidence are to be decided by the Court, and all discussions of law addressed to it. Courts are not infallible, but errors in law are safeguarded by rights of appeal, and otherwise; and although the jury have the power to find a general verdict which includes questions of law as well as fact, you are not to attempt to correct by your verdict what you believe to be errors of law upon the part of the Court, and you are bound to receive as the law what is laid down by the Court as such, in order that the administration of justice may be carried

on upon well-established principles. All questions of fact other than those heretofore mentioned in these instructions must be decided by the jury, and all evidence thereon addressed to them. [18]

No. 14.

You, subject to the control of the Court in the cases specified, are the judges of the effect and value of evidence addressed to you.

However, your power of judging the effect of evidence is not arbitrary, but to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds.

A witness wilfully false in one part of his testimony may be distrusted in others. The oral admissions of a party should be viewed with caution.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust. [19]

No. 15.

You are to consider these instructions as a whole.

It is impossible to cover the entire case with a single instruction, and it is not your province to single out one particular instruction and consider it to the exclusion of all the other instructions. All are to be considered by you as a whole.

As you have been heretofore instructed, your duty is to determine the facts of the case from the evidence admitted, and to apply to these facts the law as given to you by the Court in these instructions; and the Court does not, either in these instructions or otherwise, wish to indicate how you shall find the facts or what your verdict shall be, or to influence you in the exercise of your right and duty to determine for yourselves the effect of evidence or the credibility of witnesses. [20]

No. 16.

When you retire to your jury-room you will elect one of your number foreman, whose duty it will be to represent you and speak for you in Court and sign the verdict that you agree upon. All twelve of you must concur in any verdict you reach.

I hand you herewith two forms of verdict. Each form contains a blank before the word "guilty" for your finding on each count. If you find a defendant not guilty you will insert the word "not" in the blank. If your finding is guilty, draw a line through the blank.

You should not be influenced in your determination of one charge by such finding as you may make in the other, except in so far as the evidence is pertinent to both charges.

After careful consideration of all the evidence submitted to you, when you arrive at a verdict, you will have your foreman sign the verdict so found, and return the same into open court in the presence of you all.

JUSTIN W. HARDING,
District Judge.

Given at Juneau, Alaska, January 7, 1930.
Filed Jan. 8, 1930. [21]

[Title of Court and Cause.]

VERDICT (MRS. STEVE STANWORTH).

We, the jury, duly empanelled and sworn in the above-entitled cause, find as follows:

That the defendant MRS. STEVE STANWORTH is —— guilty as charged in Count One of the indictment.

That the defendant MRS. STEVE STANWORTH is not guilty as charged in Count Two of the indictment.

Dated at Juneau, Alaska, this 8 day of January, 1930.

JOHN A. MARTIN,
Foreman.

Entered Court Journal No. 5, page 398.
Filed Jan. 8, 1930. [22]

[Title of Court and Cause.]

VERDICT (STEVE STANWORTH).

We, the jury, duly empanelled and sworn in the above-entitled cause, find as follows:

That the defendant STEVE STANWORTH is —— guilty as charged in Count One of the indictment.

That the defendant STEVE STANWORTH IS NOT guilty as charged in Count Two of the indictment. Dated at Juneau, Alaska, this 8 day of January, 1930.

JOHN A. MARTIN,
Foreman.

Filed Jan. 8, 1930.

Entered Court Journal No. 5, page 398. [23]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL.

Come now the defendants in the above-entitled action and move the Court that the verdict heretofore rendered on the 8th day of January, 1930, in said action be set aside and a new trial granted on the following grounds:

First. Insufficiency of the evidence to justify the verdict and that it is against law, in that there was no sufficient evidence to go to the jury on which to base a verdict of guilty.

Second. Errors at law occurring at the trial and excepted to by the defendant, as follows:

1. The Court erred in refusing to instruct the jury, upon motion of the defendant, to return a verdict of not guilty as to each of defendants, which motion was made on the ground that there was insufficient evidence to go to the jury to warrant a conviction.

2. The Court erred in overruling the objection of the defendants, to the admission of any evidence procured by the execution of a search-warrant, it not having been proven by the Government that said search-warrant was issued upon probable cause.

3. The Court erred in overruling the motion of defendants to strike out certain testimony of the witness T. L. Chidester, relative to information derived by said Chidester from certain moonshiners to the effect that the defendant Steve Stanworth made stills for the said moonshiners.

With respect to the last error assigned, the witness Chidester, having testified that the reputation of the Archway rooms and second-hand store was bad, as being a place where intoxicating [24] liquor was kept, etc., etc., was asked on cross-examination the following question:

By Mr. GRIGSBY.—Mr. Chidester, can you name any person that talked to you about the reputation of this place or its character, who wasn't talking confidentially?

Answer.—A couple of moonshiners told me that Stanworth made their still.

Whereupon defendants moved to strike out said answer as not responsive and having no tendency to prove general reputation for the keeping of intoxicating liquor.

R. C. HURLEY,
GEORGE GRIGSBY,
Attorneys for Defendants.

Service admitted Jan. 14, 1930.

G. W. FOLTA,
Asst. United States Attorney.

Filed Jan. 14, 1930. [25]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 2023–B.

UNITED STATES OF AMERICA,
vs.
STEVE STANWORTH and MRS. STEVE STANWORTH.

JUDGMENT AND SENTENCE.

And now, to wit, on January 13, 1930, this matter came before the Court for imposition of sentence upon the above-named defendants, Steve Stanworth and Mrs. Steve Stanworth, upon the verdict of the jury duly impaneled and charged in this cause, by which verdict the above-named defendants, Steve Stanworth and Mrs. Steve Stanworth, were found

guilty of the crime of the possession of intoxicating liquor, in violation of Section One of the Alaska Bone Dry Act, as charged in count one of the indictment heretofore, to wit, on December 10, 1929, filed in this cause; the defendants are present in court in person, Howard D. Stabler, United States Attorney, appearing for the Government; the defendants are asked if they have any reasons to state why sentence should not now be imposed upon them, to which they offer no good or sufficient reasons, and the Court being fully advised in the premises, does hereby

CONSIDER, ADJUDGE AND DECREE

That it is the judgment of the Court that the said defendants, Steve Stanworth and Mrs. Steve Stanworth, are guilty of the crime of the possession of intoxicating liquor, as charged in count one of the indictment on file herein, and it is the sentence of the Court that the said defendant, Mrs. Steve Stanworth, pay a fine of One Thousand ($1,000.00) Dollars, and that she stand committed until such fine is fully paid, not exceeding one day for each Two ($2.00) Dollars of said fine; it is the further sentence of the Court that the said defendant, [26] Steve Stanworth, be imprisoned in the federal jail at Skagway, Alaska, or such other federal jail as the Attorney General may direct, for a term of eight months and that he stand committed until said sentence is fully executed.

Done in open court this 13th day of January, 1930.

JUSTIN W. HARDING,
District Judge.

Filed Jan. 13, 1930.
Entered Court Journal No. 5, page 423. [27]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on the 4th day of January, 1930, the above-entitled action came on for trial before a jury, the Honorable Justin W. Harding, District Judge, presiding; G. W. Folta, Esq., Assistant United States District Attorney appearing on behalf of the United States; the defendants appearing in person and by George Grigsby, Esq., and Robert Hurley, Esq., their attorneys; and a jury having been duly empanelled and sworn to try said cause,

THEREUPON, the following proceedings were had and testimony taken, to wit:

TESTIMONY OF T. L. CHIDESTER, FOR THE GOVERNMENT.

T. L. CHIDESTER, called as a witness on behalf of the United States, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FOLTA.)

My name is T. L. Chidester. I am a federal pro-

(Testimony of T. L. Chidester.)

hibition agent, have been such for about three years, have had about five years' experience as an officer of the law. I have known the defendants in this case, Mr. and Mrs. Steve Stanworth for about two years. On October 25th, 1929, I assisted in searching their place, called the Archway Rooms, located on Front Street in Juneau, Alaska. Deputy Marshals Feero, Brown and Garster accompanied me. We had a search-warrant.

Q. Just describe what you did under that search-warrant.

Mr. GRIGSBY.—If the Court please, we object to any further evidence as to what he did under a search-warrant, he having testified he had a search-warrant, until it has been *show* to the Court it is a valid [28] search-warrant, based on sufficient evidence.

Mr. FOLTA.—The objection comes too late. It has been tested out in the Commissioner's Court.

The COURT.—I don't think they need to show anything about the search-warrant at this time. There is no attack on the search-warrant.

Mr. GRIGSBY.—The objection is, having stated he investigated the premises under a search-warrant, we object to any further testimony until it is shown it is a valid search-warrant.

Mr. FOLTA.—Your Honor; the validity of a search-warrant, and of course the search would go with it—cannot be raised in this manner.

(Testimony of T. L. Chidester.)

The COURT.—Where was the search-warrant issued from?

Mr. FOLTA.—Juneau.

The COURT.—By whom?

Mr. FOLTA.—By Judge Boyle.

(Question by the COURT.)

The COURT.—When was it?

A. A day or so—right close to the date we made the search, I don't remember the date, around the 25th.

The COURT.—Objection overruled.

Mr. GRIGSBY.—Exception.

WITNESS.—(Continuing.) Mr. Brown and I went upstairs and I started searching the first room I came to, which was the one at the head of the stairs on the right. *I* was one of the rooms in the building called the Archway Rooms and Plumbing Shop. There are two stories to this building. The lower floor is a plumbing shop and junk shop and whiskey supplies. The second floor is a rooming-house. I proceeded to search the first room I came to, and I think Mr. Brown did also, and we searched all the rooms that were unlocked; and we came to some that were locked; and Mr. Stanworth protested the search. First he started to search my pockets. I asked him what he wanted and he said he was looking for whiskey. He had a copy of the search-warrant in his hand, said it wasn't any good and he wasn't going to have the place searched illegally, and several other things; and we came to

(Testimony of T. L. Chidester.)

room eleven, and it was locked, with a Yale lock, or Corbin lock. Mr. [29] Brown asked him to open it up; he wouldn't do it. He refused to open it. Mr. Brown said he would have to kick it in if he didn't, so Stanworth went in his quarters in the front end of the building and got a key ring. On this ring were a number of keys. He took one of the keys on the ring and unlocked room eleven. As soon as we went in there a very strong odor of whiskey come out of the door, and there was a jug of whiskey sitting on the wash-stand. There were two trunks in there, and inside the wash-stand was a bucket about half full of whiskey. A granite bucket that had moonshine whiskey in it. The jug on top of the wash-stand had moonshine whiskey in it. We examined the trunks and in one of them we found forty-eight pints of moonshine whiskey, in the other three pints of whiskey and one quart of gin. In a coat hanging on a nail in the room there was about half a pint of moonshine whiskey in the inside pocket. I see and recognize the trunks now before me. That is the stuff we seized there. Those empty cartons were on the bed and there were several empty bottles, rubber hose, sack, a funnel or two, sack of corks. The latter is in that little trunk. I examined the contents of those pints bottles. They contained moonshine w h i s k e y. (Witness examines some of the bottles.) They now contain moonshine whiskey. That one quart is gin.

(Testimony of T. L. Chidester.)

Mr. FOLTA.—I will offer the trunks as Plaintiff's Exhibits 1 and 2, this jug and contents as Plaintiff's Exhibit Number 3, and the rest of the bottles containing liquor, and the bottle containing gin as Plaintiff's Exhibit 4 and the cartons and empty bottles and corks, funnel, as Plaintiff's Exhibit 5.

Mr. GRIGSBY.—We object to the offer on the ground it has not been shown that the search under which these articles were found was pursuant to a valid search-warrant.

The COURT.—Objection overruled, and exception allowed.

Mr. GRIGSBY.—At this time, we move that all the evidence of the witness be stricken out, as regards the result of the search he testified about, on the ground it has not been shown the search was made pursuant to a valid search-warrant.

The COURT.—Motion denied, exception allowed. Exhibits admitted and [30] marked.

WITNESS.—(Continuing.) I have examined the contents of bottles in each of these cartons and find them to contain moonshine whiskey and one quart of gin. The cartons outside the trunk were empty. I have seen cartons like these before. They are used to hold those pint bottles. The sections in there are made to fit the pint bottles. I don't recall exactly where I found the empty pint bottles, they were in the room. I found a bottle of whiskey besides these. I don't recall whether the corks were

(Testimony of T. L. Chidester.)

in the trunk or one of those drawers. The corks fit those bottles that are full. The hose introduced in evidence is used for siphoning liquor from kegs into bottles. One end of the hose is inserted in the keg, and suction put on the hose until gravity starts drawing the liquor off, and put the other end of the hose in the bottle until it is filled up; then squeeze the hose and fill another bottle. Bottles are filled in that way to avoid spilling. It is one of the ways of conveying a fluid from a greater to a smaller container. The bottle of gin was found in that small trunk. We emptied out the bucket of moonshine. That jug of moonshine is the same as it was at that time. It is colored with charcoal. All the bottles containing moonshine are the same as this (one being shown to witness). All corked and of the same appearance.

There hadn't been anyone living in the room for quite a time; there was a little cook-stove in there, it was rusty, stew kettle on the stove that had a little water in it, this water was rusted to the bottom of the kettle; the bed was all dirty, papers and stuff strewn around the bed; there were a few dishes in the cupboard. They were all covered with dust. Didn't look like it had been occupied for a month. There were some cooking utensils, I believe. One coat and an old pair of shoes, worn out, holes in them, useless. The coat was in fair condition. There were no other articles of clothing there, no toilet articles, no smoking articles, magazines, let-

(Testimony of T. L. Chidester.)

ters, books or towels. All those cartons were found in that one room. There was probably a big dray load of those same kind of boxes full of empty pint bottles downstairs in the storeroom. On the back stairway there was an empty trunk similar to that big one, that had the appearance of just containing whiskey, smelled [31] of whiskey; had a whiskey wrapper in it. I know where the key is that unlocked this door. It is in the marshal's office. The defendant Stanworth said he had nothing to do with the rooms; that his wife ran the rooms.

The general reputation of these premises occupied by defendants which I have described, here in Juneau, as to being a place where liquor is stored, sold, kept or otherwise disposed of contrary to law is that it has the general reputation of being a bootlegging joint and bootleggers' cache and place where stills are manufactured.

Cross-examination.

(By Mr. GRIGSBY.)

On this search we first went upstairs. Mr. Brown went up with me. The other two went downstairs. The first one I remember seeing was Mr. Stanworth. He was feeling my pockets. I met him in one of the rooms, the first on the right as you go upstairs, a side room. Nobody else in the room with him. The room was open. It was a bedroom. I went in there first, there was nobody in there, I was searching in the drawers of the

(Testimony of T. L. Chidester.)

dresser. I was in a stooped position when I felt somebody searching through my pockets, and I thought it was Mr. Brown looking for a flashlight and I asked what he wanted and he said he was looking for whiskey. I looked around and saw Stanworth. Mr. Brown was in the hallway. Stanworth had the search-warrant. I was engaged in searching the dresser drawer before I saw Stanworth. I did not know he was there till I felt him feeling my pockets. I did not give him a copy of the search-warrant. I gave it to Mr. Garster, who as far as I know was at that time downstairs. I knew he was. I didn't deliver any search-warrant. I knew Mr. Garster had. I did not hear him or see him. I saw him go into the second-hand store. I didn't see anybody present any search-warrant. I had knowledge it would be presented. I didn't see him hand it to him. I*t* thought in my own mind he had done so. Mr. Stanworth came up to me and felt my pockets and told me that he wanted to see whether I had any whiskey on me before I went through with the search. After I saw it wasn't Mr. Brown and found what he was doing I did [32] not permit him to continue to search my pockets. He had already examined my side coat pockets only. Mr. Brown did not then come into the room. That was the first room to the right. I searched that room thoroughly. Mr. Stanworth was present part of the time. I searched it thoroughly. I don't know where Mr. Brown was at the

(Testimony of T. L. Chidester.)

time, whether in the hallway or another room. I believe he would be in another room. This room was unlocked. I don't remember the next room I searched or whether it was on the same side of the hall. There were several on each side. I don't recall each room in rotation as we searched them. I got into the other room with a key. Mr. Sanworth had it. Mr. Brown asked him to get it. He said if he didn't he would kick the door down. He said that when Mr. Stanworth refused to open the door. I don't know whether he refused to open all the doors.

When Mr. Stanworth refused to open the door I had searched the first room, that is all. I had searched the first room and then Mr. Brown asked Mr. Stanworth to get the key to the other rooms. I don't recall what Mr. Stanworth said first. The first thing he said he started in about the validity of the search-warrant. He had it in his hand at that time. He said it was no good and he wouldn't permit anybody to search his place on that. Then we said, the substance was that it was a search-warrant; if he didn't like it he could go to the District Attorney about it, and if he didn't open those doors we would break them down. Then he went into the living quarters and came out with a key ring, with a bunch of keys. Then he unlocked each door until we got to eleven and then he started in to protest again. We had been in every other room, eleven was the last room we searched. He started in

(Testimony of T. L. Chidester.)

to protest again at room eleven. Mr. Brown and myself were there. I don't know whether Bill Garster and Mr. Feero were there or not. I don't know how many rooms he had opened up to that time. I guess there are thirteen or fourteen rooms on that floor. He had not opened twelve or thirteen rooms before that. Some were not locked, others he opened, without additional protest. When we got to room eleven I don't know what he said; he just protested about the search-warrant and going into that room. He made a particular protest about [33] this particular room. He made a particular protest about all the first time. I don't know what his exact words were at room eleven, he just protested. I believe he said, "Your search-warrant isn't any good," when we were in front of room eleven. I think he raised the question of the search-warrant when we got to eleven. He raved about the search-warrant about fifteen minutes.

Q. In front of room eleven?

A. In front of all the rooms; he pranced up and down the hall, he protested all the way up, down and back. He made a particular protest about eleven. He was kicking all the time. We searched them all. He was protesting about eleven; that was the large one. He protested about all. He was running up and down the hall protesting about all.

I said he made a particular protest about eleven because he did. He did not make any more protest about eleven than about any of the rest of them.

(Testimony of T. L. Chidester.)

He unlocked eleven for us. He was protesting all the time, protested about opening eleven. He protested about every other room he opened.

I know where Stanworth got the keys. He got them from his private quarters, from one of the two front rooms. I saw him go in there and come out with them. He said he got them from his wife. I didn't see him get them. I saw her. He did not accompany me when I made the search. She didn't go through the hall with me or down to eleven. I think Garster called her after we found the whiskey and she brought the register book down. I don't know whether she brought the register book down to eleven or down to the room at the end of the hall I didn't look at the book at all. I heard a conversation between her and Mr. Garster or someone else about the contents of that book; that she had rented the room about a month prior to that date to some fisherman; I believe she said his name was Anderson; didn't know what he looked like, never saw him before; never saw him after that; couldn't describe him. She didn't describe him; she said he was a fisherman. I think she showed Mr. Garster the entry where he registered. I was there, I didn't look. These premises had the appearance of being unoccupied as living quarters. There was a small cook-stove. It was rusty. I known it from looking at it, without touching it. [34] I know the appearance of a stove that has been subjected to intense heat as to being a reddish brown color. I would say this stove was rusty,

(Testimony of T. L. Chidester.)

from looking at it. The bed was made up. Linen and blankets on it and pillows. Papers and one of those whiskey cartons. I found a coat hanging up, in fairly good condition, with a bottle of whiskey in one pocket, a half a bottle. This is the last room down the hall next the back stairway. There is a backstairs to this place. There were kitchen utensils there and dishes. A housekeeping outfit. The jug of whiskey was on the wash-stand or on a kind of a piece of furniture, about that high (indicating) and so big, square, (indicating) and it had a door in it. I don't know what you would call it. The jug was on top the wash-stand, not corked, nor paper in it. The bucket of whiskey was in the wash-stand. It had the same appearance as this other and that in the flask. The door was shut to this little cupboard. When I went into the room I could smell a very strong odor of whiskey. I don't recall whether they were newspapers or whiskey wrappers on the bed. I mean by a whiskey wrapper what you see around that bottle of gin. I happen to call that a whiskey wrapper. Not necessarily gin wrappers or quart wrappers. Scotch Whiskey, imported Scotch. I mean that which you are touching. There was some of that on the bed. Since I was there this whiskey had been in the marshal's office. I did not take it there. I went down after it was taken in. I did not see him mark it. He marked the jug and the bottles found in the trunk. I do not know it is the same trunk. I know they are the same bottles. Nobody would change them and nobody has got keys to them. I couldn't

(Testimony of T. L. Chidester.)

swear that they couldn't substitute other whiskey. They have the appearance of being the same bottles, they are the exact number. Downstairs I found some whiskey supplies, I mean by that cartons or empty bottles like that, those pieces, (indicating), that is the way they are usually shipped. I imagine they are shipped in those cartons, shipped to this town and other towns in that kind of boxes. I have seen them at different times in various places, in all the stores handling bootlegging supplies.

There are a few stores where you can buy empty pint bottles in cartons of that kind. There is no law against holding them in stock [35] or selling them. I call those whiskey supplies because they are. I have never seen them used for anything else. Not of that type I never have. Never saw any drugs or liquids put up like that. Am ready to swear a carton of those bottles constitute part of whiskey supplies. I also saw beer bottles, demijohns and kegs, sheet copper. Sheet copper is a whiskey supply; they use it in manufacturing stills. There are a great many legitimate uses of sheet copper.

That downstairs has the reputation of being a plumbing shop, and also the reputation of a still. Well it is a plumbing shop and it is a bootleg supply shop. By junk I mean second-hand stuff. I saw those bottles. I don't remember as I noticed any new stoves.

Q. See any new beds?

(Testimony of T. L. Chidester.)

Mr. FOLTA.—Object as immaterial, and part of defendant's case.

Mr. GRIGSBY.—It shows the interest of the witness. If there is a large stock of new goods there and this man can't see anything but bootlegging supplies it shows interest.

The COURT.—Objection sustained. Exception allowed.

Q. You are very careful not to mention anything that would tend to show a legitimate business being carried on there, aren't you, Mr. Chidester.

Mr. FOLTA.—Object as argumentative.

The COURT. — Objection sustained. Exception allowed.

The WITNESS.—(Continuing.) I say that this place, the Archway Rooms and Archway Plumbing Shop and second-hand store, all together have the reputation of being a bootlegging joint and a place where *still* are manufactured and where whiskey is cached by bootleggers, in the town of Juneau and outside the town of Juneau. By general reputation I mean among the officers of the law and among everybody else. I have heard lots of people express an opinion about it. I don't care to discuss who expressed themselves. I talked to a lot of citizens of this town about its being a bootlegging joint besides officers of the law. I could name them. I don't care to divulge such information. *I* was specific information. I think it is general reputation when a large number of people complain of a [36] place as a bootlegging joint. There

(Testimony of T. L. Chidester.)

were a large number of people complained to me of its being a bootlegging joint. I don't care to name them.

Mr. GRIGSBY.—We insist.

The COURT.—I don't think he has to give information that comes to him confidentially.

Mr. GRIGSBY.—Any other witness is subject to cross-examination about general reputation.

The COURT.—This is specific information from different people about this place and he isn't required to give who they were. It is in the nature of confidential information.

(By Mr. GRIGSBY.)

Q. Can you, Mr. Chidester, name any person that talked to you about this place, the reputation of this place or its char*at*er who wasn't talking confidentially? A. Yes.

Q. Who? A. Oh, George Baggin.

Q. Who is George Baggin?

A. Used to be a prohibition agent.

Q. Anybody that didn't used to be a prohibition agent that didn't speak to you in confidence?

A. Mr. Keller. I think he is superintendent of schools.

Q. What did he tell you about the place?

A. Oh, he said it was a bootlegging joint. I heard him say that, to Mr. Folta.

Q. Where?

Mr. FOLTA.—Object to that.

The COURT.—Objection sustained.

(Testimony of T. L. Chidester.)

Q. Was he giving Mr. Folta some confidential information?

Mr. FOLTA.—I object; that is going *to* far.

The COURT.—Sustained.

Q. Well, anyone else? A. Yes.

Q. Who?

A. A couple of moonshiners told me that Stanworth made their still. [37]

(Laughter by jury and audience.)

Q. A couple of moonshiners imparted the information to you that Mr. Stanworth made their still?

A. Yes, sir.

Q. Who were they?

A. I don't care to expose these moonshiners; they came in and plead guilty and showed their good faith. I don't want to tell who they were.

Q. Did they get off pretty light for telling you *the* Mr. Stanworth made their still?

Mr. FOLTA.—Object.

The COURT.—Sustained.

Mr. GRIGSBY.—Is everything this witness knows confidential?

The COURT.—That last sounds confidential.

Mr. GRIGSBY.—He has gone so far as to say that moonshiners told him this. He opened up the subject. We have a right to know who they were.

The COURT.—The National Prohibition Act specifically specifies an officer does not have to give confidential information. Information he would get from moonshiners is certainly confidential.

(Testimony of T. L. Chidester.)

Mr. GRIGSBY.—We move to strike it out as having no tendency to prove general reputation.

The COURT.—You brought it out.

Mr. GRIGSBY.—I am cross-examining on the general reputation of the place. If it is founded on confidential information which cannot be made public, then it cannot become general reputation and I move to strike it all out.

The COURT.—Motion denied. Exception allowed.

WITNESS.—(Continuing.) I don't know how many stoves Mr. Stanworth had in the Archway store.

Q. Did you notice the stoves?

Mr. FOLTA.—Object as immaterial.

The COURT.—Sustained (Witness continuing.) I wasn't looking for furniture, I was looking for whiskey. Certainly I was looking for [38] whiskey in a plumbing shop. I searched the plumbing shop after I searched the upstairs. After I found that liquor in room eleven I searched the downstairs for liquor. I don't know as anybody followed me around, I think Mr. Garster and Mr. Feero also searched it. I was looking for liquor. I don't think Mr. Stanworth was with me. Certainly I am sure that was after I searched the upstairs and already discovered these boxes. I found on the landing of the backstairs an empty trunk, which smelled of whiskey. I would not say a trunk would get the odor of whiskey from whiskey bottles being packed in it, not necessarily. There were no bottles

(Testimony of T. L. Chidester.)

in it. There was a whiskey label in it. The trunk smelled of whiskey. I didn't smell the wrapper. I could smell the odor of whiskey from the trunk, on the backstairs. There was no back door leading outside, there is a back stairway and it leads into the plumbing shop, the stairway is on the inside of the building.

Nobody unlocked any doors for me besides Mr. Stanworth. I am sure Mrs. Stanworth did not. I did not search the downstairs as thoroughly as I did the upstairs. My information was that the whole place was a bootlegging joint; you could buy a bottle of whiskey downstairs and drink it upstairs; buy a pint bottle downstairs; carry it around in your pocket of go upstairs and drink it and buy drinks upstairs. I heard that from two or three different informers you could buy drinks upstairs, over a period of over a year. That was the case on October 25th or about that time; the informers said they purchased whiskey in a downstairs apartment. It had the reputation of a place where you could buy whiskey. I don't know whether it had the reputation of being a place where you could buy drinks; I had been told by several different people, some informers, you could buy a drink there or a bottle or buy several bottles. That was not so very long before October 25th. I did not hear you could buy drinks in the plumbing shop, I heard you could buy whiskey there. I noticed what the rooms upstairs were used for. They were furnished with a bed, dresser—I believe most of them were occupied,

(Testimony of T. L. Chidester.)

and fairly well furnished; fairly clean, freshly papered; pretty well kept.

Q. It had the appearance of being a decent rooming-house, didn't it, [39] with the exception of this one room?

Mr. FOLTA.—Object as calling for a conclusion and immaterial.

Mr. GRIGSBY.—This is a nuisance charge, if the Court please, part of the *res gestae* of the search.

Mr. FOLTA.—It is a part of the defendant's case.

The COURT.—If you want to make him your own witness on that why call him. Objection sustained and exception allowed.

WITNESS. — (Continuing.) Mr. Garster was upstairs, he was in room 11, I don't know where all he went. We didn't stay together on the search. Mr. Feero was upstairs, he was in eleven. I don't know whether he was in the other rooms.

Court adjourned to Jan. 6, 1930, 10 o'clock A. M. and having reconvened, all parties present and the jury in the box, whereupon the trial proceeded as follows:

Mr. GRIGSBY.—If the Court please, before proceeding, I desire to make a motion which probably should not be made in the presence of the jury:

The COURT.—The jury may be excused.

Mr. GRIGSBY.—If the Court please, in Mr. Chidester's testimony I asked him a question if he could name any person not speaking to him in confidence, who talked to him about the general repu-

tation of the Archway rooms and store, and in the course of his replies to that question he said a couple of moonshiners told him that Mr. Stanworth made their still. I have already moved to strike out all his testimony, but I desire to move to strike out that particular answer on the ground that it is not responsive; and his later testimony revealed that information was imparted in confidence so the answer was not responsive in any sense, and of course is prejudicial. Of course the original question was, "Can you name any person that talked to you about the reputation of the place or its character, who wasn't talking in confidence." His testimony is neither directed to general reputation nor is it testimony not in confidence, because he says it was in confidence, relating to specific acts. I have the right of course to cross-examine him. On cross-examination he has no right to blurt out anything not responsive, and if the Court has [40] doubt the record will show I am speaking correctly; otherwise he could volunteer anything he wanted to; and later on the remark was made by the Court that I brought it out. I didn't bring it out. If I asked, "Who did you talk to about the general reputation of this place as a place where liquor is stored?" and he answered, "Bill Jones told me he bought whiskey there," it is not responsive. It does not pertain to general reputation, it is specific, voluntary piece of information, and prejudicial.

Mr. FOLTA.—That isn't my recollection of the way the answer was made and I think perhaps the

record should be read. While it is true a question of general reputation might show a particular class of evidence, when he cross-examines him to be specific and brings out an answer of that kind it is certainly responsive.

(Record read.)

Mr. GRIGSBY.—If the Court please, the question was if anyone talked to him who wasn't speaking in confidence. He is protected from telling who they were for the reason it was spoken in confidence. Therefore it is not responsive. Also in response to my question about general reputation he responds by saying a couple of moonshiners told him that Stanworth made their still and objects to further cross-examination for the reason it is confidential. Of course I could not portect myself until the answer was given.

Mr. FOLTA.—It will be noticed by referring to this testimony after Chidester gave the answer. "Yes, two moonshiners told me Stanworth made their still" Mr. Grigsby didn't ask to have that stricken he went further and examined him on it. After he finds the answers are unfavorable he moves they be stricken. If a party finds testimony developed by his own question is not favorable it is too late to move that it be stricken. Furthermore, that question doesn't embody what facts were stated in some question before that and to which he now refers. There wasn't anything in the question which brought that answer which called for a specific answer. I think the answer is plainly responsible and it will be remembered, too, if we go back

to this first question that Mr. Grigsby asked, as to the character of this place. An answer that a couple of stills were [41] made by the defendant in this place would certainly show the character of the place and also be responsive.

Mr. GRIGSBY.—The character of a place cannot be shown by specific acts. It can be shown by general reputation, which they undertook to show by witnesses. He testified he knew the general reputation and it was bad; and I asked, "Who did you talk to?" I said, "Did you talk to anybody about its reputation who was not talking in confidence?" and he names Mr. Baggin, disposes of him, names Keller, and then I asked, "Anyone else?" and he says, "Yes, a couple of moonshiners told me that Stanworth made their still," and he says I followed it up and brought out something unfavorable. I said, "Who were they?" and he won't tell, because it was confidential. If it was confidential he doesn't have to tell me. The question was, "Did you talk to anybody who was not speaking in confidence." That being the situation I move to strike it out. Furthermore, it relates to a specific act and not responsive to the question.

The COURT.—That question, "Anyone else?" might refer back or refer to anyone not in confidence.

Mr. GRIGSBY.—It wasn't understood that way, if the Court please; we have already mentioned Baggin and Keller and talked about whether it was in confidence or not. "Anyone else," has to relate back to some previous question. "Anyone else"

what? Anyone else who talked to you about the reputation of this place who wasn't talking in confidence. There is no other reasonable construction.

The COURT.—I don't feel that way. Of course the witness on the stand—how he interprets the question—

Mr. GRIGSBY.—How about the question of being responsive? Suppose I say, "Anyone else in the world talked to you about the reputation of this place?" and he answers: "A couple of moonshiners told me Stanworth made their still." He has no right to make that answer. It is not responsive. It is a specific act. I can't be blamed for bringing it out. I asked a legitimate question [42] about reputation. What somebody told him was done there is not reputation. Reputation is made by people who talk about a place, discuss it, not by people who come and tell him they bought whiskey there. The fact that two moonshiners told him they had a still made there has no bearing on reputation; it is specific information and confidential. I think for both reasons the court should strike it out. (Further argument.)

The COURT.—I will deny the motion and exception allowed.

TESTIMONY OF C. V. BROWN, FOR THE GOVERNMENT.

C. V. BROWN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FOLTA.)

My name is C. V. Brown. I am a deputy marshal stationed at Petersburg, Alaska. I was in Juneau on the 25 of October last; I know the defendants in this case, Mr. and Mrs. Stanworth, and that they lived down on Front Street on the 25 of October last, in a two-story frame building. The lower floor was used for a plumbing shop and second-hand store, the upstairs for a rooming-house. The defendants lived in the front room upstairs. On that date we had a search-warrant and I went down and searched the premises with Mr. Garster, Mr. Feero and Mr. Chidester. Mr. Garster and Mr. Chidester and I went upstairs and Mr. Feero downstairs, and told Stanworth we had a search-warrant, and he come right up the steps behind us, Mr. and Mrs. Stanworth, both of them. We went up to the head of the steps and stopped until they come up. When they come up Mr. Garster served them with the search-warrant and we searched the place.

Q. Do you recognize those articles, Mr. Brown, Government's Exhibits One to Five? A. Yes.

(Testimony of C. V. Brown.)

Mr. GRIGSBY.—We object to any further testimony as to the result of any search made there for the reason the witness has disclosed by his testimony they were acting under a search-warrant, and it hasn't been shown they were acting under a valid search-warrant. [43]

The COURT.—Objection overruled, exception allowed.

Q. Now, Mr. Brown, you say you recognize Exhibits One to Five? A. I do.

Q. Where did you first see them?

Mr. GRIGSBY.—Object on the same ground as previously stated; and if the Court will permit that objection to run to the entire testimony it will save interruptions.

The COURT.—I overrule the objection. I don't know how far it will apply to the entire testimony.

Mr. GRIGSBY.—So far as it applies to the result of this search.

The COURT.—It is satisfactory to me.

Mr. GRIGSBY.—Exception to be allowed each question relating to the result of this search. It will save interrupting continually.

Q. Where did you see these exhibits, these articles embraced in Exhibits One to Five?

Mr. GRIGSBY.—Same objection.

The COURT.—Exception allowed.

A. Archway Rooming-House. They consist of two trunks, one containing 48 pints of moonshine whiskey, the other containing 3 pints of moonshine whiskey and one quart of gin, and one gallon jug

(Testimony of C. V. Brown.)

full of moonshine whiskey and one bottle of moonshine half full of moonshine whiskey, corks, funnel, siphon hose, some cartons and wrappers, all found in room eleven. I, Mr. Chidester, Garster and Mr. Stanworth were there when they were found.

Mr. Stanworth unlocked the door, it had a Yale lock.

Q. Where did Mr. Stanworth get the key if you recall?

A. He had been opening doors along the hall on each side and when we got to that one I tried it and it was locked, he said he didn't have a key. I told him he would have to get one or else I would have to force it open. He went to his apartment and got a key and come back and opened it. When we first gave him the search-warrant he looked it over and said he didn't want us to search the place, because it was an illegal search, that the man's name didn't appear, who signed the search-warrant. [44] Mr. Garster told him the search-warrant was legal and the man's name was on the affidavit in the commissioner's office. After that he continued objecting, he didn't want the place searched. When we came to room 11 he objected to searching that. He said he did not want the room searched, didn't want the place searched, said he didn't have a key for it. I told him if he didn't open it I would force it open. He went and got the key. There was a bed in room 11 and a small wash-stand, a stove, sink, and I believe a couple of chairs; a jug of whiskey sitting on the

(Testimony of C. V. Brown.)

wash-stand, a tin pail about half full of moonshine whiskey sitting inside; trunks sitting there by the table; two large trunks and another trunk sitting back against the wall; and a half pint bottle of whiskey in a coat hanging on the wall. That jug, Plaintiff's Exhibit Three was sitting on the wash-stand, it was uncorked. The odor of liquor was very strong when we opened the door. The room did not look to me as if it had been occupied for some time. There was dust around over the stove and pieces of cartons and papers on the bed, the same kind of pieces of cartons as those there that is in the trunk. The bed didn't look like it had been occupied; linens was on there, the sheets, and pillows on top, but it hadn't been wrinkled as though it had been used; it hadn't been used; hadn't been slept on. The linen was fairly clean other than the dust on it, hadn't been used. There was a stove in the place, it didn't look like it had been used recently, there was rust on top of it, a stew-pan or saucepan on the stove. There were a few dishes in a little cupboard there, six or eight different pieces of dishes in it. They were covered with dust. The room was not swept out or cleaned out or anything. There was an old pair of shoes that didn't have any laces in them, and this old coat hanging on the wall and one shirt one of those kind of thick shirts with stripes running down on it, and an old felt black hat. I think that was all. There were no toilet articles, combs nor mail matter. I didn't see any towels nor anything that would

(Testimony of C. V. Brown.)

indicate the room had been occupied, I smelled one of those bottles, tasted it, [45] rubbed it in my hand, smelled of it. It was moonshine whiskey. On the 25 of October I had been acquainted with this building in which the defendants were operating their business for some time. The general reputation in Juneau of that place as to being a place where liquor is kept, stored, sold or otherwise disposed of contrary to law, was that of a place where liquor was kept and sold. I examined the articles of clothing found in that room for laundry marks and didn't find any. There is a back stairs and a front stairs to this building we searched. The back stairs comes down into the store, and there is a landing about halfway down. The stairs comes down into the second-hand store, I think, I am not sure. I think it is the one into the second-hand store and there is an entrance that way outside on to the roof. There is only two ways to get to the second floor, the back stairs and the front stairs. I think you would have to use the back stairway by going into the store first, I don't know. There may be another entrance. There was another trunk sitting on the landing similar to this large one, same style trunk. Mr. Chidester opened it, looked in to see what was in it. I didn't. I just see it was there. I have seen cartons of this kind before. They are generally used for whiskey flasks. That siphon hose is used to siphon whiskey out of kegs or jugs into bottles.

(Testimony of C. V. Brown.)

Cross-examination.

(By Mr. GRIGSBY.)

Q. Myself, Mr. Garster, Mr. Chidester, and Mr. Feero went there together. Mr. Feero went into the downstairs. I did not see who was downstairs when I went there, Mrs. Stanworth was right outside the door. He told her to come inside that we had a search-warrant for the place, and they went right upstairs, Garster and I and Chidester went upstairs. She was standing in front of the store when we first went there, Mr. Stanworth was inside. Mr. Feero went in and we went up the steps. Mr. Feero spoke to Mrs. Stanworth and then went inside and the rest of us [46] went upstairs and Mrs. Stanworth went into the store. We stopped at the head of the steps and didn't do anything. We didn't have but half a minute. We went together and Mr. and Mrs. Stanworth followed us up. They come up the stairway inside. Mr. Feero did not come up. He didn't come up at all. I was present at the head of the steps when he delivered the search-warrant. He served it at the head of the steps before we opened any room. Mr. Chidester was there with me. He was not with me all the time. He was before we give the search-warrant to Mr. Stanworth he was. Mr. Garster gave it to him. There wasn't any conversation with me at the head of the stairs. When he come upstairs Mr. Garster says, "I have a search-warrant for your place," and handed him a copy. That was before anything was done, before we went into

(Testimony of C. V. Brown.)

any room. Mr. Stanworth looked at the search-warrant and said he didn't want the place searched illegally and that it was an illegal search-warrant, because no name was signed to it, the name wasn't signed, it was typewritten. Mr. Garster told him the man who signed the complaint would be in the commissioner's office up at the judge's office. Then we searched the rooms. Some was open, some he unlocked. He got keys from Mrs. Stanworth, a bunch of keys. He did not make any protest about unlocking the rooms after we told him if he didn't unlock them we would force them open. Mr. Garster had the original search-warrant. He showed him the original. After that Mr. Stanworth went ahead and unlocked the doors, got a key and unlocked the doors, without further protest until he got to room 11, he protested at room 11. Some doors was open, some not. When he got to 11 he said he didn't have the key to it. I told him if he didn't unlock it I would have to force it open. Then he got the key and unlocked it. That was all the protest. He said he didn't have a key, but I noticed he went and got one, went to the apartment and got a key and came and unlocked it; he might have had it in his pocket for all I know, but when he got back he unlocked the door. He had gone along the hall to get it. I don't believe [47] Mrs. Stanworth unlocked any doors. I wouldn't say she didn't, because he got the keys from her; I don't know whether she unlocked any before he got them from her or not I don't remember. I

(Testimony of C. V. Brown.)

wouldn't say she didn't. All I saw unlocked were unlocked by Mr. Stanworth. I did not see Mr. Stanworth go into the room where Mr. Chidester was and feel his pockets. I might have been in one of the other rooms. We didn't all go together in the same room. I went in one, Mr. Chidester in one, Mr. Garster in another, Mr. Stanworth did not offer to search me. I wouldn't let him. I don't know what he done to Mr. Garster. Yes, I noticed the dust on the dishes in room 11 particularly, there was dust on them. I didn't draw my finger across them, but I could see dust when I looked in the cupboard. No, I didn't make a note of it. I took mental note of it. I examined the place with a view of determining in my own mind whether it had been occupied recently and noticed the bed had no indications of being slept in recently. I don't remember testifying in the commissioner's court on the preliminary hearing in this case. I didn't tell you at that time that I couldn't tell whether the bed showed signs of having been recently occupied. I am sure about that. I testified at the hearing some time last fall a few days after the arrest in the presence of United States Commissioner Fox, Mr. Folta, yourself, and Mr. Hurley, at the time you made a protest about the legality of the search-warrant. I did not at that time testify that I saw no indications from which I could tell whether the bed had been recently occupied or not or in words to that effect. I did not say I could not swear whether it had been slept in recently or not at that

(Testimony of C. V. Brown.)

time. I saw no laundry marks. I looked for laundry marks on the shirt in there. There were no towels. I didn't see any. I wouldn't swear there were none, but I looked and didn't see any. I looked on the sheets and pillow-cases for laundry marks. There was no such thing as pajamas in there. [48]

TESTIMONY OF W. R. GARSTER, FOR THE GOVERNMENT.

W. R. GARSTER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FOLTA.)

I am a deputy United States marshal stationed at Juneau. I know the defendants Mr. and Mrs. Stanworth and where they lived October 25, 1929. It was at the Archway Rooms Front Street, Juneau. Mr. Stanworth has a plumbing shop and second-hand store, I guess there is a lot of stuff down there, and rooms upstairs which Mr. and Mrs. Stanworth occupy in the front part of the building, and furnished rooms to rent. They occupy and operate the whole building. I have known that building for more than 10 years. I believe the defendants have been in it over a year, I should think I am not sure. I know what the general reputation of that place was as a place where liquor is kept, stored, sold or otherwise disposed of contrary

(Testimony of W. R. Garster.)

to law during the time the defendants have been in it and up to the time of October 25. It was bad. I served a search-warrant for the whole premises on Mr. Stanworth on the 25 of October, 1929. In the afternoon of that day Mr. Chidester came to the marshal's office with a search-warrant from the United States Commissioner and handed it to me to be served through the marshal's office. I docketed it in my docket and proceeded down town with Mr. Brown, Mr. Feero and Mr. Chidester. On arriving at the Archway Rooms, when we walked in through the little hallway at the bottom of the stairs, I told deputy Feero to go in the store and see if Mr. Stanworth was there and come upstairs, as I had a search-warrant for the place. I went in there. Brown, Chidester, and myself went upstairs and waited at the top of the stairs. Mr. Stanworth came up immediately after us and I gave him a copy of the search-warrant. I then went into the bathroom, which is also the linen locker. He come in and sat on the bathtub and argued with me about the search-warrant; said it wasn't legal [49] and he didn't want his place illegally searched. He said the complainant's name wasn't signed on it. I said, "The complainant's name is T. L. Chidester and it is typewritten in the warrant. If you want to see his signature you will have to go *the* the commissioner's court, and you will find his signature on the complaint for the search-warrant." He then went out and Mrs. Stanworth came in and I searched the linen locker, and from there went into

(Testimony of W. R. Garster.)

the front part of the house with her, in their kitchen and bedroom, in the kitchen I found—

Mr. GRIGSBY.—We object to any evidence from this witness as to what he found as a result of this search for the reason that it has not been shown he was acting under a valid search-warrant.

The COURT.—Overruled. Exception allowed.

WITNESS.—(Continuing.) I then made a search of the place. I went from the bathroom and linen locker to the kitchen. I recognize those articles comprising Government's Exhibits One to Five. I first saw them in room 11, Archway Rooms, in the upstairs portion of the building that I have described as operated by the defendants on that date. We found there 51½ pints of whiskey, gallon jug, two pieces of hose, some corks, funnel, jug of whiskey I guess, jug of whiskey and a bucket half full of moonshine whiskey, all found in room 11, the last room on the right-hand side of the hallway upstairs. There was no test made of this liquor at that time or later only tasting and smelling. It was tasted and smelled at that time by myself. I found it to be alcoholic liquor, commonly known as moonshine whiskey. I did not taste or smell of all the bottles. (Witness picks out three bottles pours some out and smells it.) Witness continues: The contents of those bottles is alcoholic liquor commonly known as moonshine whiskey. (Witness is handed bottle of gin, Exhibit Number 3.) Witness continues: This tastes like gin; it contains gin. I have had 17 years' experience in

(Testimony of W. R. Garster.)

the tasting of liquors for alcoholic content. There is a stairway in front and a stairway leading down back from the floor of this building on which the rooms are. Room 11 is right at the top of the back stairway. When I come in there there were two trunks [50] and a gallon jug, that jug there, standing on a small table. There was no cork in it. At that time Mr. Brown pulled a bucket half full of moonshine whiskey from a little cupboard. There is another table in there, chairs, stove and a bucket of coal. On the back of the door a coat was hanging in a *close* closet with a curtain hanging over it. There was an old striped jumper, under the table was a pair of shoes without *lashes,* one of the shoes had a hole in the sole about that long (indicating); on the table was an old black felt hat. On the wall was a cupboard with two or three shelves in it and probably a dozen assorted dishes; I think there was a stew-pan or something on the stove. I couldn't say exactly, but I think it was a stew-pot or stew-pan; and the sink for washing dishes. I could not say that it had been occupied for some time; the room hadn't been swept out for one thing; dust was over the place; on top of the bed was some papers; papers and cartons; the sheets was clean and pillow-cases clean, seemingly never been slept in, in my opinion. There were no indications whether there had been a fire in the stove recently. The top of the stove was rusty. There were no toilet articles around there or any articles of clothing other than I have mentioned. I didn't see any

(Testimony of W. R. Garster.)

towels at all nor toilet articles, nor smoking articles, nor mail matter of any kind nor magazines, papers or letters. There were pieces of torn paper, I don't know what kind, and pieces of brown carton, similar to the pieces there (indicating) on the bed. This jug was in plain sight on top of the little table when I came in there. There was quite a smell of whiskey when I came to the door. There was no cover on the bucket, no cork in the jug. There was not any objection to the search of room 11 that I remember. The only thing I know, when I came out in front I heard an argument between Mr. Brown and Mr. Stanworth as to the opening of—I don't know what room it was—but it was opposite 11, and I heard Mr. Brown say, "If you don't open it I will have to force it open," when I got there there were three in the room, Mr. Stanworth, Mr. Chidester [51] and Mr. Brown. After we searched room 11 and got the trunks and found the other stuff I went down the hall to a little table by the phone where she has a register book. I looked in the book and found the name "J. Anderson" for 11. I asked her in the presence of Mr. Feero who J. Anderson was. She said she didn't know, thought he was a fisherman; he came on the first of October, paid a month's rent and secured a room. I said, "Where is he now?" She said, "I don't know, I haven't seen him." I said, "How come there is fresh linen on the bed. Seemingly it has not been slept in." She said, "I put fresh linen on every week." I told her at that time

(Testimony of W. R. Garster.)

I thought if a fisherman rented a room he would rent it to keep his clothes in; they generally do; lots of rooms in town are rented to fisherman to keep clothes in. I think that is all the conversation I had at that time. I had a conversation with her in the kitchen about what I found in the kitchen. I think that was all she said about the occupancy of this room, they hadn't seen him, didn't know him, thought he was a fisherman. After we was through searching the rooms I told him he would have to come to jail; he said he didn't see why he would have to come up; he didn't have anything to do with it; his wife was the one who had the rooms. I told him his wife's name didn't appear on the search-warrant. Either Deputy Brown or Chidester asked him for the keys of the trunk. I don't know which asked him, but one did. He said he didn't have any keys and he didn't know anything about it. I sent Deputy Feero to get a key of 11 from Mrs. Stanworth. There was a back stairway to this place leading down to the back of the store. You cannot use that stairway without going into the store. There was a trunk on the first landing of that stairway down from the upper rooms. I didn't examined it. Brown and Chidester examined the trunk and Mr. Chidester went downstairs right through—I think—to the downstairs. I was upstairs at the time, and Deputy Feero came up sometime *up* after Mr. Stanworth came up, but then Deputy Brown and Mr. Chidester took Mr. Stanworth up to jail and

(Testimony of W. R. Garster.)

Deputy Brown and I waited and put the stuff on the wagon and brought it up. I took into custody the key to room 11. I [52] have it with me. Deputy Feero brought it from Mrs. Stanworth I believe. I asked him to get the key to eleven. I put it in the lock and tried it and put a card on it. I couldn't say where it come from at the time room eleven was searched. I wasn't there when they opened eleven.

After room eleven was opened and searched, sometime afterward I sent Feero for the key, and I tried it and put a card on it when it fit. It has been in my custody in the marshal's office ever since.

(Key offered in evidence and marked Exhibit 6.)

WITNESS.—(Continuing.) All those articles embraced in Exhibits One to Five have been in the storeroom in the marshal's office ever since.

A siphon hose, such as taken here, is used for siphoning whiskey from barrels into bottles or jugs. Those are pint bottle corks and fit beer bottles just the same.

Cross-examination.

(By Mr. GRIGSBY.)

I served the search-warrant. Deputy Feero went into the store at my direction. I couldn't say who was in the store. We all went down there together. I didn't see anybody standing outside the store. I didn't look particularly. Didn't see anybody not that I know of. I first saw Mrs. Stanworth upstairs. I did not go to her apartment when I went

(Testimony of W. R. Garster.)

upstairs. I first saw her in the bathroom and the linen locker. She was not in the bathroom when I first saw her. I first saw her in the bathroom. I thought you meant when I went in. She was in the bathroom. I don't know where she come from. At the time she came into the bathroom the search-warrant had been served. I was searching the linen locker at that time. The search-warrant was served in the hallway at the head of the stairs. I did not tell Mr. Feero to tell Mr. Stanworth to come upstairs, nor to tell her to come upstairs. I don't think she was there when it was served. I think she come up immediately after Mr. Stanworth. The first time I seen her was when I was in the bathroom.

I don't know whether she came upstairs or from her front apartment or not. We served them with a search-warrant, and I went into this bathroom, combined locker and bathroom, and started searching, and he came in and sat on the bathtub and told me he did not want *the* [53] *searched* as the warrant was not legal. I said, "What is the matter with it" and he says the man that made the complaint isn't signed to it. I said, "The man who made the complaint is T. L. Chidester. If you want to see his signature go to the Commissioner's Court and see it on the complaint." I had the original with me. No one but Mr. Stanworth and I were present when this conversation took place. That is the first protest made to me about the search-warrant. I was there all the time. Yes, I

(Testimony of W. R. Garster.)

know it was the first protest made. I think when the protest was made Mr. Brown was out in the hall going through the rooms. Mr. Chidester was in the room nearly across the hall from where I was; when I came out Mr. Chidester was stooping over; I think in the room across from the bathroom; Mr. Stanworth asked if I had anything on me. I said, "What do you mean." He said, "Whiskey." I said, "I am not in the habit of carrying whiskey." I pulled out my flashlight and said, "I have a flashlight here." I went in and felt of Mr. Chidester, and Mr. Chidester turned around and said something, I don't know what it was. He had a conversation in which he said something about planting something in the house when they made a search, and I think Mr. Brown said he wasn't going through his. He went to lay hands on me and I pulled out the search-light and told him I had a search-light if that was what he wanted. I did not see him lay hands on Mr. Brown. I don't think I would have allowed him to search me. After this conversation I went to the kitchen with Mrs. Stanworth. We all searched then. We always do in a search. Nobody had produced any keys up to that time that I saw. I had not at that time heard any conversation about keys, I don't think. The first time I heard any conversation was I looked at the end of the hall when I came out of the front room—it was after opening a certain door. The first I heard was an argument at room eleven. Oh, they were talking in the hall; Mr.

(Testimony of W. R. Garster.)

Brown and Mr. Stanworth and Mr. Chidester, about something, but I was searching the linen locker at that time. I don't know what was said; the first I heard was when I came out of the Stanworth's quarters at the end of the hall Mr. Brown told Mr. Stanworth if he didn't open the door he would have to force it, kick it in. I don't know what room, but I [54] presume it was eleven, because when I got there they were in that room. After I heard that conversation I went down to the end of the hall and they were in there. I couldn't say who unlocked the door. After I heard the conversation at the end of the hall I went there immediately after I left Mrs. Stanworth, searched the bathroom and went down there. Nobody passed me as I went down the hall that I know of. Not Mr. Stanworth. He was there when I got there. When I heard Mr. Brown tell him he would have to open the room or he would break it in I was standing in the hall, coming from the living quarters, and went right down to eleven. When I got there Mr. Stanworth was there. He didn't pass me in the hall that I know of. There was clean sheets on the bed, clean pillow-cases. There was dust all over the bed. I didn't particularly notice that there was dust on the clean sheets or the pillow-slips. There was dust all over. I am not in the habit of talking to other officers about my testimony. The District Attorney is not the officers you mean.

Q. Haven't you all gone in there together and talked to them?

(Testimony of W. R. Garster.)

Mr. FOLTA.—Objected to as immaterial and incompetent.

The COURT.—Sustained.

Q. You didn't—after Mr. Chidester went off the stand yesterday, have any conversation with him?

A. I haven't had any conversation with Mr. Chidester since he was on the stand. I have spoken to Mr. Brown. No, I didn't compare our testimony. I never compare with anybody. I wouldn't swear there were no towels in the room. The fluid I say was whiskey was in a bucket in a small cupboard, in an enamel bucket, not a slop-jar; it had a handle on it. There was sink there, a scuttle of coal, full up to the top.

There was some rust on the top of the stove. I did not examine it for rust. I could see it was. It was reddish brown color, if that is the color of rust. The key I offered in evidence I sent Mr. Feero for. That was after the search. I don't think Mr. Feero searched anything downstairs. I don't think he searched any rooms at all; he came into eleven when I was there. During the *gret* portion of the time when I knew the reputation of the place there was a taxi stand run there [55] called the Blue Bird, run by Clifford Graham and his wife, I don't know whether they lived in the Archway Rooms or not; they had a lot of business up there. I saw them go there frequently, lots of times. I don't know where they lived at that time. They did not operate the Blue Bird Taxi on October 25th. I think Graham's taxi driver was running it for them

(Testimony of W. R. Garster.)

at that time. I don't know. I do not know where Graham was living on October 25th. I don't know where he is now. I think he is or was around Ketchikan, I don't know. I would swear I saw a sink in room eleven; in the corner by the kitchen stove.

Redirect Examination.

(By Mr. FOLTA.)

I saw Graham, Canning, and wife go into the Archway Rooms, all three.

TESTIMONY OF WM. FEERO, FOR THE GOVERNMENT.

WM. FEERO, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FOLTA.)

I am a deputy United States marshal, stationed at Douglas. I know the defendants in this case. Have known them six or seven years. That was when they were living at Douglas. I know where they lived, what place they operated on the 25th of October last. It was the Archway Rooms down on Front Street, next the Arctic Pool Hall. The building is two-story, rooming-house upstairs, and downstairs Mr. Stanworth conducts a second-hand store, general store. It is on the waterfront in Juneau. I know what the general reputation of that place, that building was on October 25th last, as a

(Testimony of Wm. Feero.)

place where intoxicating liquor is kept, sold, stored or otherwise disposed of contrary to law. It was supposed to have liquor *dols* there and stored there, a place where liquor was being dispensed, being handled, contrary to law.

On October 25th I went down there with Deputy Brown, Marshal Garster and Prohibition Agent Chidester and served a search-warrant on the place. We went down there and got down in front of the building; Mrs. Stanworth was outside, so we asked her to step inside and told [56] her we had a search-warrant for the place. At that time Mr. Stanworth was coming from the back; we met inside the door there, the front door, and I believe I told him the same thing, or Mrs. Stanworth told him we had a search-warrant for the place, one of us did; both of them went upstairs, and Mr. Garster and Mr. Brown and Mr. Chidester, as we come in; they went right upstairs, and Mr. and Mrs. Stanworth followed them up. I remained downstairs, I believe, until after all the searching was done. I went upstairs later, and went back to the room eleven where Deputy Garster was, and Mrs. Stanworth came in, I believe, and Mr. Garster asked her—he was looking at the register—and asked her about who had that room and she said a fellow by the name of J. Anderson. He asked if he had been there lately and she said she didn't know, that he paid the rent on the first of the month and she didn't know whether she had seen him since or not. I believe after that Mr. Brown was trying to com-

(Testimony of Wm. Feero.)

pare a coat or something there with a pair of pants or with a coat found in the room, and Mrs. Stanworth left there, and Mr. Garster asked me to go get a key for eleven, so I went back to their living quarters and asked Mrs. Stanworth for a key to eleven, and she took a key off a ring and gave it to me. I took it back and the key seemingly was a key for eleven. I examined the interior of room eleven. I never looked at the contents of the trunk.

Q. You never looked at the contents of the trunk. Did you make any examination of any liquid there?

Mr. GRIGSBY.—Objected to for the reason it hasn't been shown this search was made pursuant to a valid search-warrant, any warrant, valid or otherwise.

The COURT.—Overruled.

Mr. GRIGSBY.—This is after the search had been concluded. The officers had gone, he had been sent for the key to room eleven. We object to any testimony on his part as to what he saw in room eleven on the ground it has not been shown his examination is the result of a search based on any warrant, valid or otherwise.

The COURT.—Overruled. Exception allowed.

The WITNESS.—(Continuing.) Deputy Garster was still there. I examined liquor [57] there at that time. It was in a glass jug, moonshine whiskey. There was a bucket there that had the smell of liquor in it. There was nothing in it at the time. I do not know what had been done with the bucket before my arrival, only by hearsay. I don't

(Testimony of Wm. Feero.)

think the room was recently occupied. There wasn't anything in there that would show it was occupied; the only thing there was trunks, liquor, coat, pair of old shoes and jumper. No fire in the place, no evidence of any fire recently. I looked at the stove, didn't examine it. Did not notice anything that would indicate whether a fire had been in it for some time. The bed was all mussed up when I was there, the bed was turned back towards the wall, springs was bare, part of it. I don't think the place had been cleaned out. I know it hadn't. The floor was not clean, didn't look like it had had a broom for some time. I have mentioned all the articles of clothing I saw there. There were no toilet articles, nor mail matter, letters, magazines or newspapers or towels. Room eleven was open when I came upstairs. Mr. Garster was in it. That is when I noticed these things. I don't know what the officers had done in there before I came. I saw the room as it was after they had been searching it. I noticed the odor of moonshine whiskey about the place.

Cross-examination.

(By Mr. GRIGSBY.)

I said the general reputation of this place as to being a place where liquor was kept, sold *store,* was bad. I don't know about it on October 25th. Previous to that time. I had heard it probably six or seven months before, off and on. I couldn't state how close to October 25th I had heard it. It was in, within, a month or so of that time. I couldn't

(Testimony of Wm. Feero.)

state exactly. I heard it talked about mostly by my fellow officers. I believe Shorty Graham was running the Blue Bird Taxi at the time I heard the case discussed. When I went to get the key at the direction of Mr. Garster, he was in the room. He wanted to see if she had a key for the room, I presume. I did not know they had already unlocked the door for Mr. Garster. He did not tell me he wanted the key to take up for an exhibit. I went to Mrs. Stanworth and asked for the key to room eleven and she took it off a key [58] ring she had with other keys on it, a dozen or more. I believe that when I first come up there, Mr. Garster and Mrs. Stanworth were looking at a register and I heard a conversation about J. Anderson. I looked at the register, at the name. I saw the name J. Anderson, I am not sure of what date. I believe there were other names following it. It was just an ordinary rooming-house register.

TESTIMONY OF ALBERT WHITE, FOR THE GOVERNMENT.

ALBERT WHITE, called as witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FOLTA.)

My name is Albert White. I am the United States marshal for this division. I know the defendants, Mr. and Mrs. Steve Stanworth when I see

(Testimony of Albert White.)

them. I know where they lived on October 25th last. It was in the Arcade Rooms, Archway or Arcade, down there, second-hand store underneath, right next the restaurant. It is a two-story building with rooms on the second floor. The general reputation of that place, that building was on October 25th last, that of selling liquor down there.

Cross-examination.

(By Mr. GRIGSBY.)

I was the United States marshal on October 25th last.

TESTIMONY OF W. K. KELLER, FOR THE GOVERNMENT.

W. K. KELLER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FOLTA.)

My name is William K. Keller. I am superintendent of schools at Juneau. Have been such for six and a fraction years. I know Mrs. Stanworth, defendant, but do not recognize Mr. Stanworth. I know where they lived or operated last October. It was the Archway Plumbing Shop. It is a two-story building as I remember it, located near the Arcade Cafe, and the downstairs is a plumbing shop. I assume the Archway Rooms are upstairs. The general reputation of those premises which I

(Testimony of W. K. Keller.)

have just described, in Juneau, was on the 25th day of October, as being a place where intoxicating liquor is stored, sold [59] or handled contrary to law, was bad.

Cross-examination.

(By Mr. GRIGSBY.)

I know what the general reputation of that place was in that respect. I know what is meant by general reputation. I had heard the place discussed during the year. I don't recall any specific cases, any particular persons who talked to me about it. I am not unfriendly with Mrs. Stanworth. Never had any trouble with the Stanworths that I know of. I do not know that they filed charges against me. I do not know that Mrs. Stanworth had gone to the School Board and complained about me punishing her boy. I never heard of it. She talked with me about it but not about filing charges. She came to see me and complained. I never heard anything further about it. Never heard it mentioned by a member of the school board or by others, nor *hear* that the matter was taken up by the school board. Never heard of it, nor by anybody on their behalf.

TESTIMONY OF WINN GODDARD, FOR THE GOVERNMENT.

WINN GODDARD, caled as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FOLTA.)

My name is Erwin M. Goddard. I am assistant to the executive officer of the Alaska Game Commission. I am acquainted with the place where the defendants, Mr. and Mrs. Stanworth have been living last October and previous to that time. It is a building located next to the Arcade Cafe. I have never been in the building, but as I recall it has a plumbing shop or hardware store downstairs next the place known as the Imperial Pool Hall, on Front Street.

It is a two-story frame building; on the upper floor I believe they have rooms. I know the general reputation of that place on October 25th last, and preceding that time, as being a place where intoxicating liquor is stored, sold or handled contrary to law. I believe it was bad.

Cross-examination.

(By Mr. GRIGSBY.)

The downstairs in that place as I recall was a plumbing [60] shop or hardware, of some kind. I have lived here since 1925 this time. I have known the reputation of the place since September,

(Testimony of Winn Goddard.)

1928. I did not altogether get my knowledge of the reputation of that place from talking to officers of the law, federal officers. I heard it discussed, I do not recall by whom. I could not name the persons I heard discuss it.

The Government here rested its case.

Mr. GRIGSBY.—At this time the defendants move the Court to direct a verdict of not guilty on each count of the indictment, for the reason that there is not sufficient evidence to go to the jury to support a conviction on either count. The two counts are, if the Court please, possession and maintaining a nuisance. Of course, neither of the offenses can be committed without the knowledge of the defendants; that is, they couldn't be responsible for any liquor being kept there they didn't know about, and there is not a scintilla of evidence in this case imputing any knowledge of the existence of liquor in the Archway Rooms at the time of the indictment or any other time, on the part of either of the defendants. The evidence won't support a conviction. If there should be a conviction in this case, on the evidence introduced, it would be the duty of the Court to set it aside. If there is any evidence tending to show that knowledge I don't know what it is. I can't call it to mind.

The COURT.—The motion is overruled. Exception allowed.

DEFENDANTS' CASE.

TESTIMONY OF MRS. MILDRED BART, FOR DEFENDANTS.

Mrs. MILDRED BART, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRIGSBY.)

My name is Mrs. Mildred Bart. I know the defendant Steve Stanworth and his wife, Mrs. Steve Stanworth. Have known them for three years. I know the store kept by Mr. Stanworth, and the rooms above it known as the Archway Rooms. I have had some connection with those rooms, since July, in the way of making the beds, wiping up the floor, helping Mrs. Stanworth with the rooms. From July up till now. [61] I have lived in Juneau five years in May. I am married. My husband works for the Thomas Hardware. I have been assisting Mrs. Stanworth in taking care of the rooming-house. I know the room known as room eleven.

I recall the occasion of Mr. Stanworth being arrested about the 25th of October last. I was in room eleven the Saturday before it was raided. I made the beds, dusted and wiped the floor, dusted the woodwork. On the Saturday prior to *to* this arrest, before I made it up, its condition as to having been occupied was, that it had been occupied,

(Testimony of Mrs. Mildred Bart.)

and blankets thrown over the bed like some fellows will do when they go out and spreads (?) his bed up. I made up the bed. Put fresh linen on it. I have never seen anyone going in there. I went in and cleaned the room, put on linen, and that was all. I had been in there every Saturday before that at the direction of Mrs. Stanworth.

If the room was unoccupied and had no tenant, I wouldn't ordinarily in the course of my work, make it up if didn't need changing. I did not notice any liquor in the room at the time I made it up. There was none inside. There were two trunks in the room. I know there is a stove in that room. It was not rusty, just from being overheated. The color was from heating. They had a radiator in the room; I don't see how the stove could be rusted. The steam was on. The room was warm. I do not attend to the dishes; I just go in and make the bed and do the dusting but I never attend to the dishes. Just clean the room generally.

Cross-examination.

(By Mr. FOLTA.)

I have nothing to do with the renting of the room. I made up room eleven every Saturday from the time I was employed there. From July on. I don't know whether it was occupied then. I don't know the roomers at all. I have nothing to do with the records. I don't remember when it was I first noticed these two trunks in that room. I don't really know whether it was the first time I made it

(Testimony of Mrs. Mildred Bart.)

up. I never paid any attention, and so far back and all I don't keep track of what goes on in the rooms. I don't know when I saw them there for the first time. They were in there on the Saturday before the arrest, and making the bed and putting linen on it I took off the bedclothes and had to put them on the trunk. I don't remember exactly when the trunks were there. [62] They weren't there when he moved there. I remember they were there, the week before it was raided. They were there before that, but I don't remember which day they were in there. I didn't look at the record; I don't remember when the fellow moved in, or when I first did see the trunks. I remember I saw them before the arrest because they were there. I don't know how long before. I did not see that jug the (Witness is shown exhibit.) Never saw it there, nor anything like it. I did not examine the cabinet or space underneath the wash-stand. I had no business in there, that is his personal things, I don't know what might have been in there. I have never seen these trunks opened, no. I did not see any cartons such as these around here. There was not such a thing as a carton on the bed a week before or at any time when I made up the room. I never saw a hose of this kind or two of them, nor anything like that, nor any whiskey flasks, corks or funnel. When I made it up I left towels there. I left some the Saturday before the raid. I left two bath towels and a hand towel. Did not notice any clothing hanging in the place. Never looked be-

(Testimony of Mrs. Mildred Bart.)

hind the closet. If there had been any clothing hanging in plain sight I would have seen it. I didn't see any. I never paid any attention; I made the beds, swept and dusted and went out. I came any time she needed me; if there was only one or two rooms rented she did it herself. I came only when she called me, and if I was down town and wasn't busy, then I helped her. Any day she called me I went. If the place was full she generally let me know.

She would call me every time I went down there. When I went down there like this Saturday before the arrest I would stay about three hours. I never saw anybody going in or out of room eleven. When I wanted to go into a room, for instance like eleven, I got in with a key. Mrs. Stanworth would give me the key. The door to eleven had a Yale lock on it. The steam was always turned on. On the Saturday before the arrest there was no fire in the stove. I remember that because it was warm and they had some kindling laying there and the kindling was in the box, and it was in July and all along they had no fire when I was there; they had no fire only when cooking; there was a coffee-pot on the stove and tea-kettle. I remember that, and no fire there. [63] I judge that by the kindling. The kindling was not there all through July; he always had the wood-box full of kindling. I did not see it full of kindling every time I was in there. Sometimes it was full of coal, sometimes kindling; not always. I noticed pots on the stove although

(Testimony of Mrs. Mildred Bart.)

I had nothing to do with them, and that it was a coal stove. I generally stuck the trash in the stove. I didn't notice anything on the wall. Generally noticed magazines. No smoking articles. Never saw anybody go in there while I was there. Have no way of knowing who occupied that room except what Mrs. Stanworth might have told me.

Redirect Examination.

(By Mr. GRIGSBY.)

There was not a sink in that room. There was a razor on the dresser. I saw it the last time I was in there. There were no smoking articles. There was a razor and talcum powder. The Saturday before this raid, yes sir. I never saw any liquor in that house. Absolutely not. Nor any indications of it. I have been in every room in the house. I went there every day, if necessary, but when there were only two or three rented I went once in a while. They were rented most of the time, practically every day in the winter, and I was down town almost every afternoon.

Recross-examination.

(By Mr. FOLTA.)

If I happened to drop in I worked every afternoon. Every time she needed me I worked there; if she didn't and I was downtown I helped her just the same. When I was downtown and dropped in and helped her I got paid for it, absolutely. It didn't make any difference when I dropped in.

(Testimony of Mrs. Mildred Bart.)

She paid me for what I did. She gives me the keys and whatever are ready to make up I make up, and the ones who are out she tells me and I make them. On the days I was there she certainly makes up some of the rooms, but if it is busy, she has to answer telephone and the store bell when Mr. Stanworth is out. It doesn't make any difference about the division of the work; we go right along together. Certainly what one of us would see the other would see. I never saw any liquor nor evidence of it nor any bottles, not even in her living [64] quarters. Never saw a sack of bottles that she claimed to pick up in the rooms. Never saw a bottle at all.

Redirect Examination.

(By Mr. GRIGSBY.)

The keys were on a ring or chain. The key to eleven would be on the same as the rest.

Recross-examination.

(By Mr. FOLTA.)

I remember it was on that ring the same as the rest. I certainly do remember every key on there. I do not remember on the week before Oct. 25th what other rooms I made up. I didn't keep track of them. I remember room eleven because I always go in there with Mrs. Stanworth. I have always been in the kitchen, always in the back kitchen. I remember being in room eleven with Mrs. Stanworth. I don't remember any other room I

(Testimony of Mrs. Mildred Bart.)

was in on that particular day, but I do remember eleven. In fact I do the scrubbing. I remember I was in there that particular day because I have to wipe up the floor. I do have to wipe the other rooms. Yes, sir, that is the thing I remember it by. I had to wipe the floor of room eleven. If there is some vacant I don't wipe the floors of the vacant rooms.

TESTIMONY OF CHARLES E. NAGEL, FOR DEFENDANTS.

My name is Charles E. Nagel. I am the Finance Clerk, Public Survey Office. I have been in Alaska a little over twenty-nine years. I am acquainted with Steve Stanworth and Mrs. Steve Stanworth, the defendants in this case. I have known Mr. Stanworth about four years and Mrs. Stanworth about two, since they have been in business down there. I know their general reputation as law-abiding citizens. It has always been good. I am not familiar with the Archway Rooms, operated by Mr. and Mrs. Stanworth. I never heard anything about the general reputation of the Archway building as a place where liquor is stored, until this case came up. Never heard anything in that connection. Never heard it was a place where liquor was stored for the purpose of sale or barter, not since Stanworth has been there; it used to have that reputation years ago.

(Testimony of Charles E. Nagel.)

Cross-examination. [65]

(By Mr. FOLTA.)

I haven't heard it discussed at all. Not the building, no.

TESTIMONY OF J. F. MILLER, FOR DEFENDANTS.

J. F. MILLER, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HURLEY.)

My name is J. F. Miller. My business is banking. The Behrends Bank. I am vice-president. I have lived in Alaska twenty years. I know Steve Stanworth and Mrs. Steve Stanworth, the defendants in this case. I have known them probably rather intimately for the past five years, since they have been on this side. I know their general reputation as being law-abiding citizens. It is very good. I have some acquaintance with the Archway Building, occupied by Mr. and Mrs. Stanworth as a rooming-house and plumbing shop and second-hand store. I never heard such a thing charged against the building as being a place where liquor is stored for barter or sale.

Cross-examination.

(By Mr. FOLTA.)

On account of Mr. Clark's estate, the rent is paid there, and I know more or less about the building.

(Testimony of J. F. Miller.)

I did not hear the reputation of the place discussed. The association I mentioned with the defendants is a business association. I come in contact with them in a business way.

Redirect Examination.

(By Mr. HURLEY.)

The rent is paid in the bank and I have a little knowledge of the building on that account. That is all.

Recross-examination.

(By Mr. FOLTA.)

The rent is paid in the bank, the bank doesn't go down there and collect it.

TESTIMONY OF GABRIEL PAUL, FOR DEFENDANTS.

GABRIEL PAUL, a witness on behalf of defendants, being first duly sworn, testified as follows: [66]

(By Mr. HURLEY.)

My name is Gabriel Paul. I am in the grocery business. I have been in Alaska twenty-four years. I am acquainted with Mr. and Mrs. Steve Stanworth, defendants in this case. I have known them, pretty hard to tell, since we were kids. I know their general reputation as being law-abiding citizens. It is very, very clear and good so far as I know. I know the building they occupy, known as the Archway Building, that they use for a rooming-house

(Testimony of Gabriel Paul.)

upstairs and a plumbing shop downstairs. I never heard that the building had the general reputation of being a place *where is* stored for barter or sale.

Cross-examination.

(By Mr. FOLTA.)

I never heard any discussion about the Archway Building until here lately, until they were arrested. None before that at all.

The defendants are not customers of mine. Sometimes they drop in and get a pint or quart of milk, but not regular customers.

TESTIMONY OF CASH COLE, FOR DEFENDANTS.

CASH COLE, a witness called on behalf of defendants, being first duly sworn, testified as follows:

(By Mr. HURLEY.)

My name is Cash Cole. I live in Juneau. Have lived in Alaska thirty-four years. I am Auditor of the Territory. I am acquainted with Mr. and Mrs. Stanworth, the defendants in this case. I have known them, I guess in the neighborhood of twenty years. I would say their general reputation is that of being law-abiding citizens.

They are as far as I know law-abiding citizens. I am acquainted with the building they occupy on Front St. called the Archway Rooms where they conduct a rooming-house upstairs and a second-hand store downstairs. It has not, to my knowl-

(Testimony of Cash Cole.)

edge, the general reputation of being a place where intoxicating liquor is kept for sale or barter.

Cross-examination.

(By Mr. FOLTA.)

I never have heard any discussion of its reputation. I form the basis of my answer from not having heard any discussion of it. I say they are law-abiding citizens so far as I know. I made that general. I don't know whether the defendant is a citizen. I base that [67] statement on the fact of good business relations I have had with Mr. Stanworth for the past five years he has worked for me. On my business transactions with him. I have been in his place.

TESTIMONY OF E. F. CASHEL, FOR DEFENDANTS.

E. F. CASHEL, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRIGSBY.)

My name is E. F. Cashel. I know the defendants, Steve Stanworth and Mrs. Steve Stanworth. He is my brother-in-law. I was in the Archway Rooms the latter part of October or first part of November.

I seen the arrest of Steve Stanworth in the paper, and some time after that along the 1st of November I was in the Archway Rooms. Mrs. Stanworth

(Testimony of E. F. Cashel.)

asked me to examine a stove in room eleven with a view to ascertaining its condition as to being rusty. I did examine it; it wasn't rusty though. It was from the heat. It wasn't what you would call rusty; the blacking was taken off, and from the heat, it wasn't rusty. It wasn't exactly black. It showed the effects of intense heating.

Cross-examination.

(By Mr. FOLTA.)

I made this examination about the 1st of November. I came over here seeing I had no other place to go to see my brother-in-law; I dropped in here. Mrs. Stanworth asked me to examine the stove. I don't know why. She just wanted to see what it looked like. I looked it over thoroughly. I didn't look underneath, just on top of the stove. She didn't ask me. I remember particularly now the top of the stove but I don't know the condition of any other part of the stove. I don't know why I looked at the top of the stove further than that she asked me to examine the stove. Mrs. Stanworth took me to room eleven. I saw a coffee pot and tea pot in the room. I didn't see any clothes. It wasn't occupied that night. It might have been occupied. I couldn't say whether it might have been occupied several days before I made this examination. I don't know what the condition [68] the top of that stove was in on October 25th. I wasn't here. It couldn't have been rusty, because it would show rust. It didn't look as if it had been wiped off. It might have been.

TESTIMONY OF MRS. STEVE STANWORTH, FOR DEFENDANTS.

Mrs. STEVE STANWORTH, one of the defendants, called as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRIGSBY.)

My name is Anne Stanworth. I am one of the defendants in this case. Mr. Stanworth is my husband. I live down on Front Street in the Archway Rooms. I have lived in Alaska five years this time. I lived in Douglas before for twelve years. I lived in the upstairs of the Archway Building, in the front quarters. There is eleven rooms in that building for rent besides my own quarters. We have been occupying that two years in February. Have been running it as a rooming-house two years in March. After we took possession I furnished it all up, put in new furniture, and new linoleums, and new everything in fact. Repapered it twice. I manage the rooming-house. Mr. Stanworth has absolutely nothing to do with the rooms. I take care of the rooms. I recall the occasion of the search that was made detailed here by the officers.

I was there the afternoon they came. They came between two and two-thirty, I guess it was. I was sweeping off the veranda in front of the store, downstairs. In fact, I didn't see anyone coming in the building and the only time I knew anyone

(Testimony of Mrs. Steve Stanworth.)

was around regarding the law was when Mr. Feero called I was wanted, that they had a search-warrant for the place and called me into the store. He says, "Better go upstairs," he says. "The law is upstairs; better go upstairs," so I went upstairs; my husband came shortly after me. I had opened up the linen closet. Mr. Garster directed me to open up the linen closet. At that time no warrant had been served on me, or on anybody. I unlocked it. I had the keys in my apron pocket. I had the keys to the entire rooming-house in one bunch. I opened up the linen closet at Mr. Garster's request. I opened up four sleeping-rooms at the direction of Mr. Garster and Mr. Brown. They were in already and forced me to open [69] that door, this door and the next door. I unlocked them. I unlocked four rooms and the linen locker only. I didn't keep on unlocking rooms because Mr. Stanworth demanded the bunch of keys to find out what the trouble was and about wanting to see the search-warrant first. That was after I opened up four rooms. Mr. Stanworth said he wanted to know what it was all about; they claimed they had a search-warrant; he said, "You will have to show me the search-warrant before you go any further."

Q. What did you do then?

A. In the meantime my husband said he wanted to see the search-warrant and Mr. Chidester says—

Mr. FOLTA.—Object to any hearsay testimony. Let those who took part testify to that.

Q. You were there?

(Testimony of Mrs. Steve Stanworth.)

A. You heard this? A. Yes.

The COURT.—What was the question? (Question at line 12 read.)

Mr. GRIGSBY.—(Arguing.) What occurred then? If the Court please, the narrative of what occurred up there on the part of the officers was all to show resistance or something amounting to guilty conduct, and I have a right to go into everything she saw there.

Mr. FOLTA.—Except hearsay.

Mr. GRIGSBY.—We are not trying to prove anything by hearsay, but we have a right to prove what was said.

Mr. FOLTA.—We object to what was said because it is irrebuttable.

Mr. GRIGSBY.—If the Court please, the gentleman don't seem to understand what hearsay evidence is. The fact that somebody had a conversation is not hearsay. When you try to prove a substantive fact by what somebody told you, that is hearsay. Here is a search, evidenced by the conduct—

The COURT.—But the search isn't in question.

Mr. GRIGSBY.—We are not questioning the validity of the search now, but questioning the insinuation of the prosecution that there was any guilty action there, any conduct from which an inference of guilty can be presumed; any undue resistance or anything to prevent a search [70] other than he could rightly do. They testified to

all the conversations. The prosecution put in evidence the conversations here.

The COURT.—They put in evidence statements of the defendants in the nature of admissions, by what they said; I don't know of course; what they said might be material along that line and might not.

Mr. GRIGSBY.—Your Honor just made that statement: "Defendants said in the nature of admissions." I consider that prejudicial and ask your Honor to ask the jury to disregard it, because I don't recall any admissions.

The COURT.—Of course the jury will disregard any conversation had between counsel, but the statements of defendants of course are admissible as admissions and on that basis they were admitted.

Mr. GRIGSBY.—I except to the remarks of the Court on the ground that there is no evidence of any kind on the part of the defendants.

The COURT.—The Court does not intend "admissions" as a technical term, but as a term in its ordinary sense. I am using the term in its technical sense and it is on that basis the conversation of the defendants may be admitted. Of course the jury are instructed to disregard what conversation is had between counsel in regard to this matter. If you want the jury to withdraw, they can.

Mr. GRIGSBY.—No. But my question is what occurred then. If a witness for the prosecution told anything that occurred, on direct examination, we have certainly a right to go into the same thing.

The COURT.—I will ask the jury to withdraw and remain within call of the bailiff. You can tell me what this conversation was and how it is material. (The jury retired.)

Mr. GRIGSBY.—If the Court please, the evidence for the prosecution shows that certain liquor was found in room eleven. They also attempted to show Mr. Stanworth very strongly objected to this search; to show his objections they showed certain conversations and actions, and said he ran up and down the hall protesting, and protested again when he got to room eleven. Everything was gone into. Here is a witness present at the search, and I simply want her to tell her account. [71]

The COURT.—How is what they said going to be material on that question? What is her answer?

Mr. GRIGSBY.—I *couls* ask leading questions, as to what occurred after Mr. Stanworth said he wanted to see the search-warrant. I want to know who delivered it to him. They said Garster. I expect to prove by the witness.

The COURT.—You expect to open the door to everything that was said?

Mr. GRIGSBY.—It is already open to everything that was said.

The COURT.—The witness is instructed not to testify to what was said by the officers. If you have anything material on this question it will be a different matter, but until it is shown it is material, the Court will not permit this evidence.

(Testimony of Mrs. Steve Stanworth.)

Mr. GRIGSBY.—Your Honor already admitted it.

Mr. FOLTA.—I challenge that statement.

The COURT.—Anything which will cast light on it, all right. If you have it, show it. The jury is gone.

Mr. GRIGSBY.—I asked what occurred; it is not a leading question.

The COURT.—She is instructed not to state what the officers said in regard to this search.

Mr. FOLTA.—I object to anything she said because it is a self-serving declaration. If there was any testimony showing either defendant made admissions, then she might have a right to deny it, but she has no right to testify to self-serving declarations or hearsay, because I couldn't rebut it.

The COURT.—No, she cannot testify to that unless it is a specific question or something brought out in the case in chief as to what she said.

Mr. GRIGSBY.—Then I must ask leading questions.

The COURT.—That is the ruling.

Mr. GRIGSBY.—I take exception to the Court's ruling.

The COURT.—Exception noted, call the jury.

The WITNESS.—(Continuing.) Up to the time I had unlocked the linen closet and four rooms no search-warrant had been served. After I had unlocked these four rooms Mr. Stanworth came upstairs and took the keys from me. I was down opposite the fourth room. And then he demanded

(Testimony of Mrs. Steve Stanworth.)

to see the [72] search-warrant. The warrant was served by Mr. Chidester, right in front of room four. My husband searched them to see if they had liquor. He searched Chidester and Brown and Garster. I didn't see him search Garster but I saw him search Brown and Chidester. He searched Chidester in the hallway. I saw him search Brown. When my husband wanted to stop Mr. Brown said if he didn't open the doors he was going to kick them in and put handcuffs on him and put him where he belonged.

The COURT.—Mrs. Stanworth, you are directed not to state what was said, what was done; that was the instruction of the Court to you when the jury was withdrawn. The jury is instructed to disregard that remark.

The WITNESS.—My husband had the keys and opened the rest of the doors while I watched Mr. Garster when he come into my place. I went with him. I was not present when room eleven was searched. When I went into the kitchen with Mr. Garster my husband had the key to room eleven. I was not in there when he unlocked it. I did not hear a conversation in front of eleven. It is quite a long ways down the hallway. I don't know what took place down there. It is the last room down the hallway. There is a door at the end of the hall going into a back hall off of which room eleven is. Room eleven was occupied at that time. I rented it the 1st of October. The party moved in the second. That room as distinguished from the

(Testimony of Mrs. Steve Stanworth.)

rest of the rooms was a room you could do light housekeeping in. It was rented as a housekeeping room when I rented it. When that room was rented that way I had occasion to visit it once a week. The rooms I rented as sleeping rooms I made up every day. I made up room eleven every Saturday.

I was in there the Saturday before Mr. Stanworth was arrested. As the lady testified, she was helping; I gave her the linen. She cleaned up the room. I went into the room on that day. I noticed the condition of the bed as to having been slept in. It had been used recently. I know the linens were mussed up. I had been in the Saturday before that and made it up at that time. We put clean linen on once a week. Clean linen was put on every Saturday after the 1st of October. I wasn't in there until between the Saturday prior to the arrest and the Saturday prior to that; after they raided it and the bed was all mussed up. But when I made [73] it up on the Saturday prior to that it showed evidence of having been slept in, and the Saturday still prior to that I had made it up. There was a stove in the room. In the first place it was a second-hand stove, a little bit red from excessive heat. It wasn't rusty; it couldn't be; there was steam heat in the room. When I was in there the Saturday before the arrest I saw no evidence of liquor being there. I didn't notice any smell of liquor. I left two towels there. Bath towel and face towel. I do that every Saturday. It was a second-hand

(Testimony of Mrs. Steve Stanworth.)

stove when I put it in the room. This man paid rent for one month when he rented the room. I gave him a key to the room. You cannot get into that room or hallway adjoining the room except from in front, up the front stairs. You can't get up the back way because it leads through the store and is our private place. That is kept locked, absolutely. I did not see the trunks moved in there. Certainly they could have been moved in without my knowledge; I am busy around and can't pay attention to who comes in and goes out. I see lots of baggage. I had no knowledge of any liquor of any kind being kept in room eleven on October 25th or any other time. It was absolutely without my knowledge.

Cross-examination.

(By Mr. FOLTA.)

When I was in there every Saturday before the arrest, I gave the linen to the lady. I remember giving it to her. Yes, I always take—I have to take them to the door for her. I was in the room and gave her the linen. I handed it to her. Certainly. I always go to the linen closet myself. I hand out the linen. I go to the linen closet and get the linen and give them to her. I saw this fellow after he rented the room a couple or three times. I saw him in the hallway. I saw him come upstairs one time and saw him back in the hallway the next time. Yes, I saw him come up the stairs once and once from the back stairs. The back hall is never locked. There is a door between but never

(Testimony of Mrs. Steve Stanworth.)

locked. Anybody can go the back way, sure, because there is a toilet in back and one in front.

Q. Then you can go into the store?

A. No, because the door at the foot of the stairs is locked. I imagine it would be locked this day the officers were there. I did not find out anything about this man [74] since that time. I did not try, because I did not see him any more.

Question: You were charged with the possession of this liquor in what you claim was his room, and yet you didn't make any effort to find out where he is or anything about him?

WITNESS.—(Continuing.) I don't know where he is. I didn't try to find out. I could, yes. Did not make any inquiry when he came there the 1st of October, I was in my kitchen when I first saw him. He came looking for a room. He came in the evening. He said he was looking for a room. I told him I had no sleeping rooms right now, but I had a housekeeping room. That is different from any other room because you can do light housekeeping in it. Dishes and a stove. There is no other place. I told him I had no sleeping rooms, but I had a light housekeeping room. All the other rooms were occupied. I did not have any others at that time. He consented to take it. It was two or three days before I saw him again. I saw him the next day, he moved. He took it the first and moved in the second. I saw him coming up the stairs, the front hallway. Not with anybody. Had nothing in his hand, had no conversation with

(Testimony of Mrs. Steve Stanworth.)

him nor he with me. Just said, "How do you do?" That was all.

Question: You didn't see him again for how long?

WITNESS.—(Continuing.) I saw him a few days after that. I think I saw him about three times to my knowledge. The first night he simply inquired about the room and agreed to take the room. That is all the first night. The second night I passed him upstairs while I was going down. We just spoke to each other and passed by. Several days elapsed before I saw him again. I didn't know anything about him at that time. I don't remember anything about him afterwards. He paid me on the second of October, in the evening.

Q. Then you had seen him twice; when you said awhile ago you hadn't seen him for several days after the second of October?

A. I said he paid me the second.

Q. You said that now. But you said a while ago the first time was the evening of the first; the second time you saw him when you passed him going downstairs and didn't see him for two or three days. A. He paid me— [75]

Q. Sure, but a little while ago you didn't remember that. A. I saw him the first and second.

Q. When I asked if you saw him when was the next time you saw him after the morning of the second you said two or three days, didn't you?

A. Yes, sir.

Q. You know the register shows that he paid on the second? A. Yes.

(Testimony of Mrs. Steve Stanworth.)

Q. And so that is why you say now he paid on the second, you happened to think of that, didn't you?

A. He took a room on the first and moved in on the second.

Q. Yes, but you forgot about it. That is all you ever learned about him; never saw him since, nobody ever came to call on him? A. No.

Q. Ever find mail in his room?

A. No. I did not ever inquire at the postoffice whether he had a postoffice box. I was outside the store when the officers came there that day and somebody told me they had a search-warrant for the place. I went in the store. Mr. Stanworth was in the store. He was not summoned; he was in the store. Mr. Feero called me and said, "Better go upstairs, the law is upstairs." I went upstairs; my husband comes up afterwards. I didn't see the officers come into the building. I didn't see anybody until Mr. Feero called me in. They got in the side door coming upstairs. Probably my back was turned. The first of the officers I [76] saw was Mr. Feero. I did not see anybody going upstairs or hear anybody. I went in with Mr. Feero. He called me in. He told they had a search-warrant for the place. He told me, "Better go upstairs." I went. I went upstairs, and Mr. Garster he says, "Open this door." He goes into the bathroom first, and says, "Open this door," here, linen closet door, which I did. I had the keys in my pocket. I did not ask why he wanted the door open.

(Testimony of Mrs. Steve Stanworth.)

I did not know he had a search-warrant. Mr. Feero did not tell me he had a search-warrant. I know Mr. Garster when I see him, sure. I do not know the other officers. I hadn't heard a word about the search-warrant up to that time. They were insisting "Open the door," and the next door, and about that time my husband comes upstairs. They were so abrupt, "Open this door," "Open that door," next door. They wanted me to open three doors at once, which I did, first one and then another. I had the keys on me. About that time my husband came up. He demanded to get the keys from me, and wanted to know what the trouble was, and he told him they had a search-warrant for the place. They were into some of the rooms before my husband came upstairs. I couldn't say for sure exactly how long they had been in the rooms but they had been in some rooms. Before I went upstairs I saw my husband in the store. He was busy putting new mattresses in the store. A fellow works for us was in the store. I did not hear Mr. Feero call him. I didn't call him. I don't know of ever telling anybody that these officers searched three rooms before Mr. Stanworth came up. After Mr. Stanworth came up he wanted to see the search-warrant. He knew the law was upstairs and finally he came up to know what it was all about. My husband asked what it was all about. Mr. Chidester says, "I have got a search-warrant for this place." He says, "Let me see it." Mr. Chidester served the search-warrant. I saw him do that. Mr. Chidester says,

(Testimony of Mrs. Steve Stanworth.)

"Bill's got it." He says, "No, you have got it." Mr. Garster pulls a piece of paper out of his pocket and says, "No, Mr. Chidester has it," so my husband went and got it from Mr. Chidester. I heard Mr. Garster and Mr. Chidester testify here but they were mistaken about that search-warrant. Sure it was served. No one said anything about a search-warrant till my husband came in. I can't tell how long it was between that time and the time [77] room eleven was searched, because some of the rooms they weren't very particular about and others they were particular. Some time elapsed; it wasn't right away. During that time my husband searched the officers.

Mr. Chidester was standing in the hallway when he was searched by Mr. Stanworth. He was talking to him while he was searching him. Standing face to face. Mr. Chidester said he wanted to know who that was who pulled the back of his coat, he said, "I am Mr. Chidester." My husband said, "I want to see if you have anything on you." From what Mr. Stanworth said Mr. Feero and Mr. Garster didn't mind being searched. But Mr. Brown and Mr. Chidester didn't want to be searched. My husband felt him. My husband didn't have a search-warrant to search them. I don't know when was the first night when this man Anderson slept in room eleven, because as I said I changed the linen and went in to clean the room and didn't go in till the following Saturday. The first time he came up the linen was clean. I showed him the room. I

(Testimony of Mrs. Steve Stanworth.)

couldn't recall what day of the week the 1st of October, I think Monday or Tuesday.

And so I didn't wait a week to change the linen then, because I have a habit of cleaning all the linen up and sending it out in one lot, Monday, and I went in Saturday and changed it. I do the regular cleaning up on Saturday. Yes, sir. The Saturday before the arrest the room had been cleaned up. The lady who does the work for me cleaned it up. I went in and inspected it afterwards. I found it was swept out. I was in that evening after the officers found this stuff in it. It wasn't dirty. I charged this man eighteen dollars a month for this room. I charge twenty dollars a month for the other rooms. Two dollars less for the housekeeping room. The other rooms I make up every day. I supply them with linens, towels and kindling wood and they get their own coal, but there is always enough kindling there for them. He paid me a twenty dollar bill. Did not use a check. I have no way of checking up on this man. I don't know anybody else who can check up on him. I have never heard of him since. The first time he wore a dark suit, black raincoat, black hat, sometimes wore a cap. Kind of a heavy set fellow. He spoke good English. I asked him, I said, "If you take this room, the light housekeeping room, the agreement is I go in once a week and give [78] you clean linen," and he said the light housekeeping room was all right. I said, "Do you work at

(Testimony of Mrs. Steve Stanworth.)

the mine?" and he said no, he was a fisherman. There was no further conversation to trace where he worked. I was there all day of the second, part of the time, upstairs and downstairs, I was. I did not see the trunks brought in. Did not see any trunks brought in that day. I saw the trunks the first Saturday after he went in. I did not see that jug there, nor any caryons, corks, bottles, hose nor gin.

I saw the coat, but I didn't look to see what was in it. First saw the coat the following Saturday I went in after I rented it. I saw the shoes. *I* didn't have a hole in the bottom that I know of. I didn't look however. Saw no other pair of shoes there. Nobody has come around there since inquiring about what was left in the room. Everything has just simply been abandoned, yes. I have seen a cup sitting there, a teaspoon, one of the times I went in there. One Saturday. I don't know which Saturday it was. I have been in there when there had been a fire in there, because I noticed the heat, from the stove, and not from the radiator. I guess probably he had been burning rubbish or something I don't know. I know there was heat in the stove. I did not notice any papers on the bed at any time. At that time all my rooms were rented; yes.

(Testimony of Mrs. Steve Stanworth.)

Redirect Examination.

(By Mr. GRIGSBY.)

All of them are rented now. I am going to have one vacancy this afternoon.

(By Mr. GRIGSBY.)

I heard Mr. Keller testify this morning. I had some trouble with Mr. Keller. I made complaints against him to the school board.

Q. What for?

Mr. FOLTA.—Object to that—to what board she made complaint and what for. The fact that she made complaint might be proper, but not to whom she made it.

The COURT.—Objection sustained, exception allowed.

TESTIMONY OF STEVE STANWORTH, FOR DEFENDANTS.

STEVE STANWORTH, one of the defendants, called as a witness in behalf of the defendants, testified as follows: [79]

(By Mr. GRIGSBY.)

My name is Steve Stanworth. I have lived in Alaska in the neighborhood of seventeen years, fifteen to seventeen years. I am lessee of the Archway Rooms and building. Have been occupying that building in the neighborhood of two years. I use the downstairs for plumbing, heating, sheet

(Testimony of Steve Stanworth.)

metal, second-hand stores, furniture, new stoves and furniture, general repair work.

Q. How large a stock have you there in value?

A. I judge in the neighborhood of five thousand dollars.

Mr. FOLTA.—Object to that as immaterial.

Mr. GRIGSBY.—We have a right to show the nature of the business there; it is charged with being a liquor nuisance; we have a right to show anything legitimate.

The COURT.—It wouldn't be anything to prove—

Mr. GRIGSBY.—If it is a *bona fide* store and stock of five thousand dollars value, it repudiates the idea of being used as a bootlegging joint, more than if he had a few articles there as a blind.

Mr. FOLTA.—It is a self-serving declaration.

Mr. GRIGSBY.—The fact of how much stock?

Mr. FOLTA.—Calls for an opinion.

Q. Do you know the value of the stock?

Mr. FOLTA.—Object to the question as not tending to prove any of the issues.

The COURT.—Sustained.

Mr. GRIGSBY.—If the Court please he don't want any evidence in there of anything except corks and bottles. We want to show he has a five thousand dollar stock.

WITNESS. — (Continuing.) I do a general plumbing business. I was engaged in that business on Oct. 25th. The upstairs is used for a rooming-house.

(Testimony of Steve Stanworth.)

Q. What substantial jobs have you done recently?

Mr. FOLTA.—Object to what he has done recently.

Q. Prior to the 25th of October?

A. I have done a good many.

The COURT.—Objection sustained.

The WITNESS.—Mrs. Stanworth runs the [80] rooming-house. I have nothing whatever to do with the conduct of the rooming-house. I know room eleven upstairs. I remember the occasion of my arrest of Oct. 25th last. I had been bringing in a load of new mattresses and was disposing of them in a proper place on a rack in the store when my attention was called to the fact the officers were in the building to make a raid. Deputy Feero called my attention to that. I proceeded to Mr. Feero, and he said the officers were upstairs and I better go up and see what they were doing; so I searched Billy Feero, felt his pockets, and proceeded upstairs.

I got to the top of the stairway and see the officers, some in the hallway and some, I presume, in rooms, that was not in sight. I went up to Mr. Brown and asked what it was all about. He said, "We are searching the rooms." I went to Mrs. Stanworth and demanded the keys and she gave me the keys and I said, "Mr. Brown, what's this all about?" He said, "We are searching the rooms." I said, "Have you got a search-warrant?" He said, "Yes, we have." I said, "Let's see the search-warrant."

(Testimony of Steve Stanworth.)

Mr. FOLTA.—I object to any further such testimony as hearsay.

Mr. GRIGSBY.—It is not hearsay.

The COURT.—If you can show it is material.

Mr. GRIGSBY.—It is just as material as what was done; it is part of what was done.

The COURT.—It may be and may not be.

Mr. GRIGSBY.—It is part of the *res gestae;* it isn't hearsay; I am not trying to prove anything by the conversation, but simply the conversation itself.

The COURT.—I will not admit this kind of testimony unless it is shown to be material.

Mr. GRIGSBY.—I can't anticipate the answer. Your Honor permitted the District Attorney to detail the conversation.

The COURT.—If you objected to the ruling brought out by the District Attorney, then was the time to make it. As to this matter, this man will not give conversation unless it is material.

Q. Did you hear the testimony of the officers with reference to the [81] conversation with you about that search-warrant?

Mr. FOLTA.—We object to the question.

The COURT.—Overruled.

A. I did. I did not have the conversation they told about.

Q. What conversation did you have?

Mr. FOLTA.—Object to that question; it comes

(Testimony of Steve Stanworth.)

within the rule of self-serving declarations, hearsay.

Mr. GRIGSBY.—On that theory I couldn't call him at all.

Mr. FOLTA.—He can deny the conversation, but he cannot go on with hearsay.

The COURT.—I think they can be contradicted on that. The conversation you have in mind he denies should be brought out. He answered he did not have that conversation. As to what he said with regard to it the objection is sustained.

WITNESS.—(Continuing.) At the time I came upstairs some of the rooms had been opened by Mrs. Stanworth; she was the only one in possession of the keys. I took the keys from her when I come up. I asked Mr. Brown what it was all about, asked Mr. Brown for the search-warrant. He did not give me the search-warrant. He said Mr. Chidester had the search-warrant. I asked Mr. Chidester—

Mr. FOLTA.—Object to this conversation again on the same ground.

The COURT.—Of course this testimony about the search-warrant, I don't see where it is material at all. What he says about that is certainly not material. You are instructed not to repeat that conversation Mr. Stanworth; that is the instruction of the Court.

Mr. GRIGSBY.—We take an exception to the ruling of the Court.

(Testimony of Steve Stanworth.)

WITNESS.—(Continuing.) I finally got the search-warrant from Mr. Chidester. He was in the hallway when he gave it to me, some little distance from the bathroom. I searched Mr. Chidester in the hallway where I got the search-warrant from him. I searched Mr. Brown; he was standing next to Mr. Chidester in the hallway. I searched Mr. Garster. I searched them all.

Q. What was your object in doing that?

Mr. FOLTA.—Object to what his object was.

The COURT.—Objection sustained. Exception allowed. [82]

WITNESS.—(Continuing.) Yes, after they gave me the search-warrant I made some objections to the legality of it.

Q. What did you say to them about that?

Mr. FOLTA.—Object to that on the same ground as before; it is bound to be self-serving and hearsay.

Mr. GRIGSBY.—They told it.

Mr. FOLTA. —When that matter ought to be called to his attention and nothing else.

The COURT.—This affair—this evidence about the search-warrant, in the first place, isn't material at all.

Mr. GRIGSBY.—That is what I thought, but they attempted to show he was resisting the search-warrant on a flimsy pretext,

The COURT.—I won't let you bring out immaterial matter on the theory that it might be admissible. Objection sustained.

(Testimony of Steve Stanworth.)

WITNESS.—(Continuing.) I heard Mr. Chidester state that I objected to the search-warrant because it wasn't signed. That was correct. I didn't make any other objection to it that I remember. After you got the search-warrant and made objection to it that it wasn't signed what did they tell you?

Mr. FOLTA.—Object as hearsay.

The COURT.—Objection sustained.

Mr. GRIGSBY.—Exception.

WITNESS.—(Continuing.) I made no further protest. I opened doors right and left, as I came to them. I kept on doing that till I came to room eleven, before it was demanded of me. I made no protest whatever against opening room eleven. I did not have to go back to the front of the house to get the key to room eleven. The keys is on that ring, together, all numbered from one to eleven. I opened the door, pushed it open, and Mr. Brown walked in. I followed him in. No other officers went in with us two. I heard Mr. Brown state that when we went in there was a jug which contained liquor on the stand. The jug was in the commode. Brown took it out. I don't remember that I could smell liquor when I went in the room. I don't remember ever smelling any. I hadn't been in that room since I put the stove in. I heard the officers testify the stove was rusty. It was not. [83] The stove was burnt from overheating, brown-red from overheat like a stove will after— When I went

(Testimony of Steve Stanworth.)

into the room that night the clothing was spread out on the bed, the bedclothing; it looked as if it had been occupied; there was some articles of clothing, dishes, a kettle on the stove and some kind of a pot. I knew at that time the room was tenanted. Mrs. Stanworth told me all the rooms was full. Some man by the name of Anderson was occupying it. I only knew what she told me; she told me after the raid. I didn't know who occupied it previous to the raid. I do not know J. Anderson. I never did rent any rooms. I had nothing whatever to do with this liquor that has been introduced in evidence being in that room. I had no knowledge of liquor being kept in any part of those premises. I presume that these trunks could have been moved into that room without my knowing it; there have been a good many taken in and out without my knowing it. I did not ever keep any liquor downstairs. I heard the testimony of the officers with reference to finding all the bottles downstairs. I handle bottles. Buy and sell them. Yes, corks, also, rubber tubing. I presume they are handled generally in other stores in Juneau. There is other use for tubing than siphoning whiskey out of kegs into bottles. I have often had men come in to buy tubing to siphon gasoline from the gas-tanks of their cars, and many other purposes. I sell much of that tubing for those purposes.

(Testimony of Steve Stanworth.)

Cross-examination.

(By Mr. FOLTA.)

I don't know whether there was any gasoline in eleven. I don't know whether that hose in eleven was used for gasoline. I never had anything to do with the rooms in that place. Of course I would pass the time of day with the tenants in that place. I never inspected the rooms only when I had them *Paperd.* I have enough to do to attend to my own business. I had nothing to do with them.

Q. Then what did you do to see there was no liquor on the place? A. What did I do?

Q. Yes. A. I didn't do anything—

Q. What did you do to prevent liquor from getting into the house? [84]

A. If I saw you or anyone else—

Q. What did you do to prevent liquor getting into that place before October 25th?

A. I never had to do anything.

Q. You didn't make any inspection of the place?

A. No. (Continuing.) Yes, I searched all the officers there. I didn't have a search-warrant. I did have some ground whatever to make a search. You may call them legal or otherwise. I did not consult anybody about the search-warrant [85] law. I undertook to do what I thought I should do. I think everything I did was legal. Even to the search. I say this search-warrant wasn't signed. It was typewritten out.

The COURT.—What is all this testimony about

(Testimony of Steve Stanworth.)

the legality of the search-warrant—whether it was signed or not.

Mr. GRIGSBY.—Object as immaterial.

The COURT.—Objection sustained.

(Argument.)

The COURT.—That testimony about the search-warrant is not material in the case; the search-warrant is presumed to be legal as far as the jury is concerned.

Mr. GRIGSBY.—We except to the last remark of the Court.

The COURT.—Exception allowed.

WITNESS.—(Continuing.) I never saw this man Anderson either before October 25 or since. I have never done anything to find out who he is or where he was. I had business in the District Attorney's office about October 25. I don't remember any odor of liquor in that room when I opened the door. I would have remembered that if I had smelled liquor in the room. My sense of smell is normal. If there had been a smell of liquor there I might have smelled it and might not. If other people with more or less keen sense of smell smelled it I possibly would and possibly not. Anyhow I didn't. If I had I would remember it. I wouldn't allow any liquor in the place if I saw anyone taking it in. Besides the business I have enumerated I do not do a pawn business. I have never done any business of that kind. I did not do business of that kind with Fred Smith. I loaned

(Testimony of Steve Stanworth.)

him eight dollars and he left a suitcase for security. I had a man by the name of Manthy working for me in the plumbing shop. He is still working for me. I have had several different employees before Manthy over a period of two years. One did not quit because of liquor handling that I know of. [86] I never handled liquor; never heard any such story. He never said any such thing to me. I wouldn't stand for any liquor in the house. I heard the testimony about the trunk on the back stairway. I know where that came from. I put it there; there was nothing in it when I put it there and nothing in it when Mr. Chidester found it. That was not true evidence. Yes, that was like a good deal of the rest of his testimony. No, the rest of the officers did not all testify untruthfully.

Redirect Examination.

(By Mr. GRIGSBY.)

Mr. Feero testified very truthfully; Mr. Garster truthfully; Mr. Chidester was about ninety per cent off and Mr. Brown was about eighty per cent off.

WHEREUPON the defendants rested. Thereafter, after argument of the case, the Court read his instructions to the jury, after which the following occurred within the hearing of the Court and the presence of the jury.

Mr. GRIGSBY.—We except to that part of instruction 13, which says, "Errors in law are corrected by rights of appeal and otherwise."

The COURT.—Very well; exception noted.

Mr. GRIGSBY.—(The bailiffs having been sworn.) We would like to have the jury have an opportunity to inspect the premises.

The COURT.—I don't believe I will order a view in this case at this time.

Mr. GRIGSBY.—Take an exception. [87]

And thereafter, to wit, on January 7th, 1930, the jury retired to deliberate on their verdict.

And thereafter, to wit, on the 8th day of January, 1930, the jury returned a verdict finding each of the defendants guilty of the crime of possession of intoxicating liquor, as charged in count one of the indictment, to which said verdict the defendants then and there excepted on the ground that the same was contrary to law, contrary to the evidence, and not supported by the evidence, which exception was then and there allowed by the Court.

BE IT FURTHER REMEMBERED that thereafter, to wit, on the 13th day of January, 1930, judgment and sentence was pronounced against each of the defendants, whereby the defendant Mrs. Steve Stanworth was sentenced to pay a fine of one thousand dollars, and the defendant Steve Stanworth was sentenced to eight months imprisonment in the Federal jail, to which sentences defendants objected on the ground that said sentences were pronounced before the time had expired within which a motion for a new trial and motion for arrest of judgment might be filed, which objection was over-

ruled by the Court, to which ruling the defendants excepted and the exception was allowed.

And thereafter, to wit, on the 14th of January, 1930, the defendants duly and regularly filed their motion for a new trial, which is as follows:

[Title of Court and Cause.]

MOTION FOR NEW TRIAL.

Come now the defendants in the above-entitled action and move the Court that the verdict heretofore rendered on the 8th day [88] of January, 1930, in said action, be set aside and a new trial granted, on the following grounds:

First: Insufficiency of the evidence to justify the verdict and that it is against law, in that there was no sufficient evidence to go to the jury on which to base a verdict of guilty.

Second: Errors at law occurring at the trial and excepted to by the defendant, as follows:

1. The Court erred in refusing to instruct the jury upon motion of the defendant, to return a verdict of not guilty as to each of the defendants, which motion was made on the ground that there was insufficient evidence to go to the jury to warrant a conviction.

2. The Court erred in overruling the objection of the defendants, to the admission of any evidence procured by the execution of a search-warrant, it not having been proven by the Government that said search-warrant was issued upon probable cause.

3. The Court erred in overruling the motion of defendants to strike out certain testimony of the witness T. L. Chidester, relative to information derived by said Chidester from certain moonshiners, to the effect that Steve Stanworth made stills for the said moonshiners.

With respect to the last error assigned, the witness Chidester, having testified that the reputation of the Archway rooms and second-hand store was bad, as being a place where intoxicating liquor was kept, etc., was asked on cross-examination the following question:

(By Mr. GRIGSBY.)

Mr. Chidester, can you name any person that talked to you about the reputation of this place or its character, who wasn't talking confidentially?

Answer: A couple of moonshiners told me that Stanworth made their still.

Whereupon defendants moved to strike out said answer as not responsive and having no tendency to prove general reputation for the keeping of intoxicating liquor.

R. G. HURLEY,
GEORGE GRIGSBY,
Attorneys for Defendants.

Service admitted Jan. 14, 1930.

G. W. FOLTA,
Asst. United States Attorney. [89]

And on said 14th day of January, 1930, the defendants duly and regularly filed their motion in arrest of judgment, which motion is as follows:

[Title of Court and Cause.]

MOTION IN ARREST OF JUDGMENT.

Come now the defendants in the above-entitled action and move the Court that no judgment be rendered upon the verdict of guilty heretofore on the 8th day of January, 1930, rendered in the above-entitled action, and that the judgment heretofore rendered be set aside.

This motion is based on the following grounds:

This motion is based on the following grounds:

That the indictment in said cause does not state *fact* sufficient to constitute a crime, for the reason that the Alaska Bone Dry Law, or a violation of which the defendants were convicted, has been repealed by the National Prohibition Act, in so far as the offense of possession of intoxicating liquor is concerned, that being the offense of which defendants were convicted.

This motion is based upon all the records and files in said action.

R. C. HURLEY,
GEORGE GRIGSBY,
Attorneys for Defendants.

Service admitted Jan. 14, 1930.

G. W. FOLTA.
G. W. FOLTA,
Asst. United States Attorney. [90]

And thereafter, to wit, on the 1st day of February, 1930, the Court overruled said motion for a new trial, and overruled said motion in arrest

of judgment, to each of which said rulings the defendants excepted and which exceptions were allowed by the Court.

And now, on this 27th day of February, and within the time allowed therefor, the defendants duly and regularly present their bill of exceptions to the Court.

R. C. HURLEY,
GEORGE GRIGSBY,
Attorneys for Defendants.

Service admitted Feb. 27th, 1930.

G. W. FOLTA,
Asst. United States Attorney.

And the same having been examined by the Court and the counsel on both sides, and the Court having found the same to be correct and to speak the truth in every particular, to contain a full and complete record reduced to narrative form of all the proceedings had in this cause, and a statement of all the material evidence adduced in court, signs, settles and allows this bill of exceptions.

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

And I, the undersigned, the Judge before whom this cause was tried, do hereby certify that the above and foregoing bill of exceptions, so signed, settled and allowed by me, speaks the truth in every particular, contains all the material evidence adduced at the trial of this cause, and an accurate and complete record of all proceedings had, and that the same is in all respects full, accurate and

complete, AND I HEREBY ORDER that this bill of exceptions be and the same is hereby made a part of the record in this cause.

Done this 18th day of March, 1930.

JUSTIN W. HARDING,
District Judge. [91]

[Title of Court and Cause.]

MOTION IN ARREST OF JUDGMENT.

Come now the defendants in the above-entitled action and move the Court that no judgment be rendered upon the verdict of guilty, heretofore on the 8th day of January, 1930, rendered in the above-entitled action, and that the judgment heretofore rendered be set aside.

This motion is based on the following grounds:

That the indictment in said cause does not state facts sufficient to constitute a crime, for the reason that the Alaska Bone Dry Law, for a violation of which the defendants were convicted, has been repealed by the National Prohibition Act, in so far as the offense of possession of intoxicating liquor is concerned, that being the offense of which defendants were convicted.

This motion is based upon all the records and files in said action.

R. C. HURLEY,
GEORGE GRIGSBY,
Attorneys for Defendants.

Service admitted Jan. 14th, 1930.

G. W. FOLTA,
Asst. United States Attorney.

Filed Jan. 14, 1930. [92]

[Title of Court and Cause.]

ORDER OVERRULING MOTION FOR NEW TRIAL.

This matter came before the Court upon the motion of the defendants for a new trial; argument on said motion was had on January 25, 1930, and the motion submitted to the Court; and the law and the premises being fully considered and understood by the Court,—

IT IS ORDERED that said motion be, and the same hereby is, overruled.

Done in open court this first day of February, 1930.

JUSTIN W. HARDING,
District Judge.

Entered Court Journal No. 5, page 148.

Filed Feb. 1, 1930. [93]

[Title of Cause.]

MINUTES OF COURT—FEBRUARY 1, 1930—ORDER GRANTING FURTHER STAY OF EXECUTION.

Now, at this time the Court rendered an opinion in this case on a motion for a new trial in which

the motion for a new trial is overruled. Whereupon, upon motion of the attorney for the defendants, a further stay of execution, as to both defendants, is granted for a period of two weeks from this date over the objections of the United States Attorney.

[Title of Cause.]

MINUTES OF COURT—FEBRUARY 3, 1930—ORDER OVERRULING MOTION IN ARREST OF JUDGMENT.

Now, at this time Geo. B. Grigsby, attorney for the defendant, asks of the Court whether or not the motion in arrest of judgment was overruled at the time the Court overruled the motion for a new trial. Whereupon the Court stated that both motions were overruled. Counsel for the defendants asked for an exception as to the ruling of the Court on both motions and an exception is allowed. [94]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Come now the defendants, Steve Stanworth and Mrs. Steve Stanworth, appellants herein, and assign the following errors made by the trial court, as the errors upon which said defendants will rely in their prosecution of the appeal in the above-entitled cause.

I.

The Court erred in overruling the objection of the defendants to certain testimony of the witness

T. L. Chidester, a witness for the Government, as follows:

The witness T. L. Chidester, having testified that as a Federal Prohibition Agent, acting under a search-warrant, he in company with other officials made a search of the premises known as the Archway Rooms, located in Juneau, Alaska, by authority of a search-warrant, was asked the following question:

Question (by Mr. FOLTA.)—Just describe what you did under that search-warrant.

Mr. GRIGSBY.—If the Court please, we object to any further evidence as to what he did under a search-warrant, he having testified he had a search-warrant, until it has been shown to the Court it is a valid search-warrant, based [95] on sufficient evidence.

The COURT.—Objection overruled.

Whereupon the witness T. L. Chidester testified that he found, in the Archway Rooms, the premises under the control of the defendants, the following articles, which were admitted in evidence, to wit: a jug of whiskey, a bucket half full of whiskey, two trunks, one containing forty-eight pints of moonshine whiskey, the other three pints of whiskey and one quart of gin, in a coat hanging on a nail a half pint of moonshine whiskey, some empty cartons, several empty bottles, rubber hose, sack, a funnel or two, sack of corks,—all found in Room 11 of the Archway Rooms, a rooming-house conducted by the defendants.

II.

The Court erred in overruling the motion of the defendants to strike out all of the evidence of the witness T. L. Chidester regarding the result of the search he testified about, said motion being based on the grounds that it was not shown that said search was made pursuant to a valid search-warrant.

III.

The Court erred in sustaining the objection of the Government to certain questions propounded to the witness T. L. Chidester on cross-examination, as follows:

> The witness T. L. Chidester, having testified with reference to the downstairs, or lower floor portion of the Archway Building, in control of the defendants as follows:
>
> "That downstairs has the reputation of being a plumbing shop and also the reputation of a still. Well, it is a plumbing shop and it is a bootleg supply shop. By junk [96] I mean second-hand stuff. I saw those bottles. I don't remember as I noticed any new stoves."
>
> Q. (Mr. GRIGSBY.) See any new beds?
>
> Mr. FOLTA.—Object as immaterial and part of defendants' case.
>
> Mr. GRIGSBY.—It shows the interest of the witness. If there is a large stock of new goods there and this man can't see anything but bootlegging supplies it shows interest.
>
> The COURT.—Objection sustained.
>
> Q. You are very careful not to mention anything that would tend to show a legitimate

business being carried on there, aren't you, Mr. Chidester?

Mr. FOLTA.—Object as argumentative.

The COURT.—Objection sustained.

IV.

The Court erred in sustaining the objection of the Government to certain testimony and refusing to strike the same, of the witness T. L. Chidester, as follows:

The witness, T. L. Chidester, having testified that the Archway Rooms and the Archway Plumbing Shop and Second-hand Store all together have the reputation of being a bootlegging joint and a place where stills are manufactured and where whiskey is cached by bootleggers, the following occurred:

Mr. CHIDESTER.—I think it is general reputation when a large number of people complain of a place as a bootlegging joint. There were a large number of people complained to me of its being a bootlegging joint. I don't care to name them. [97]

Mr. GRIGSBY.—We insist.

The COURT.—I don't think he has to give information that comes to him confidentially.

Mr. GRIGSBY.—Any other witness is subject to cross-examination about general reputation.

The COURT.—This is specific information from different people about this place, and he isn't required to give who they were. It is in the nature of confidential information.

Q. (Mr. GRIGSBY.) Can you, Mr. Chidester, name any person that talked to you about this place, the reputation of this place or its character, who wasn't talking confidentially?

A. Yes.

Q. Who? A. Oh, George Baggin.

Q. Who is George Baggin?

A. Used to be a prohibition agent.

Q. Anybody that didn't used to be a prohibition agent, that didn't speak to you in confidence?

A. Mr. Keller. I think he is superintendent of schools.

Q. What did he tell you about the place?

A. Oh, he said it was a bootlegging joint. I heard him say that to Mr. Folta.

Q. Where?

Mr. FOLTA.—Object to that.

The COURT.—Objection sustained.

Q. Was he giving Mr. Folta some confidential information?

Mr. FOLTA.—I object, that is going too far.

The COURT.—Sustained. [98]

Q. (Mr. GRIGSBY.) Well, anyone else?

A. Yes.

Q. Who?

A. A couple of moonshiners told me that Stanworth made their still.

(Laughter by jury and audience.)

Q. A couple of moonshiners imparted the information to you that Mr. Stanworth made their still? A. Yes, sir.

Q. Who were they?

A. I don't care to expose these moonshiners; they came in and plead guilty and showed their good faith. I don't want to tell who they were.

Q. Did they get off pretty light for telling you Mr. Stanworth made their still?

Mr. FOLTA.—Object.

The COURT.—Sustained.

Mr. GRIGSBY.—Is everything this witness knows confidential?

The COURT.—That last sounds confidential.

Mr. GRIGSBY.—He has gone so far as to say that moonshiners told him this. He opened up the subject. We have a right to know who they were.

The COURT.—The National Prohibition Act specifically specifies an officer does not have to give confidential information; information he would get from moonshiners is certainly confidential.

Mr. GRIGSBY.—We move to strike it out as having no tendency to prove general reputation.

The COURT.—You brought it out.

Mr. GRIGSBY.—I am cross-examining on the general [99] reputation of the place. If it is founded on confidential information which cannot be made public, then it cannot become general reputation, and I move to strike it all out.

The COURT.—Motion denied. Exception allowed.

And thereupon, after the conclusion of the

testimony of the witness T. L. Chidester, the defendants moved to strike out the testimony of the witness Chidester to the effect that a couple of moonshiners told him (Chidester) that Mr. Stanworth made their still, on the ground that said answer was not responsive, which motion was overruled by the Court and exception allowed.

V.

The Court erred in sustaining the objection of the Government to the following question propounded to the witness, T. L. Chidester, with reference to the Archway Rooming-house, as follows:

Cross-examination by Mr. GRIGSBY.

Q. It had the appearance of being a decent rooming-house, didn't it, with the exception of this one room?

Mr. FOLTA.—Object, as calling for a conclusion, and immaterial.

Mr. GRIGSBY.—This is a nuisance charge, if the Court please, part of the *res gestae* of the search.

Mr. FOLTA.—It is a part of defendants' case.

The COURT.—If you want to make him your own witness on that why call him. Objection sustained and exception allowed. [100]

VI.

The Court erred in overruling the objection of the defendants to certain testimony C. V. Brown, a witness for the Government, who testified that on the 25th of October, 1929, he, together with Prohi-

bition Agent T. L. Chidester and other officials, made a search of the Archway Rooms and Plumbing Shop, property under the control of the defendants, under the authority of a search-warrant. Whereupon the following occurred:

Q. (Mr. FOLTA.) Do you recognize those articles, Mr. Brown, Government's Exhibits 1 to 5? A. Yes.

Q. Mr. GRIGSBY.—We object to any further testimony as to the results of any search made there, for the reason the witness has disclosed by his testimony they were acting under a search-warrant, and it hasn't been shown they were acting under a valid search-warrant.

Whereupon the Court overruled the objection, and allowed an exception.

And thereupon the witness C. V. Brown testified that as a result of his search he, in company with Mr. Chidester and others, found in the Archway Rooming-house, in Room 11, the exhibits 1 to 5, consisting of two trunks, one containing 48 pints of moonshine whiskey, the other containing three pints of moonshine whiskey and one quart of gin, one gallon jug full of moonshine whiskey, and one bottle half full of moonshine whiskey, corks, funnel, siphon hose, some cartons and wrappers.

VII.

The Court erred in sustaining the objection of the [101] Government to certain questions propounded to the defendant Mrs. Steve Stanworth on her direct examination, as follows:

The witness, Mrs. Steve Stanworth, defendant, having testified with reference to the circumstances of the search of the Archway Rooms, being the same search with reference to which the witness T. L. Chidester, C. V. Brown and other Government witnesses had testified, and said witnesses having testified to certain conversations between said officers and the defendant, Steve Stanworth, the witness, Mr. Stanworth, testifies as follows:

"Mr. Stanworth said he wanted to know what it was all about; they claimed they had a search-warrant, he said, 'You will have to show me the search-warrant before you go any further.' "

Q. (Mr. GRIGSBY.) What did you do then?

A. In the meantime my husband said he wanted to see the search-warrant, and Mr. Chidester says—

Mr. FOLTA.—Object to any hearsay testimony. Let those who took part testify to that.

Q. You were there? You heard this?

A. Yes.

The COURT.—Objection sustained.

VIII.

The Court erred in certain statements prejudicial to the defendants, made in the course of the examination of the witness and defendant, Mrs. Steve Stanworth, in connection with the testimony ruled out, and to the admission of which the objection of the Government was sustained, as set forth in the

last previous assignment of error, to wit, Number VII, as follows: [102]

During the argument as to the admissibility of the testimony of Mrs. Steve Stanworth with reference to conversation between T. L. Chidester and the other Government officers, and the defendant Steve Stanworth, the following occurred:

Mr. GRIGSBY.—We are not questioning the validity of the search now, but questioning the insinuation of the prosecution that there was any guilty action there, any conduct from which an inference of guilt can be presumed, any undue resistance or anything to prevent a search, other than he could rightly do. They testified to all the conversation. The prosecution put in evidence the conversations here.

The COURT.—They put in evidence statements of the defendants in the nature of admissions, by what they said; I don't know, of course; what they said might be material along that line and might not.

Mr. GRIGSBY.—Your Honor just made the statement, "Defendants said in the nature of admissions." I consider that prejudicial, and ask your Honor to ask the jury to disregard it, because I don't recall any admissions.

The COURT.—Of course the jury will disregard any conversation had between counsel, but the statements of defendants, of course, are admissible as admissions, and on that basis they were admitted.

Mr. GRIGSBY.—I except to the remarks of the Court on the ground that there is no evidence of any admissions on the part of the defendants.

IX.

The Court erred in instructing the jury in Instruction Number 13, as follows: [103]

"Errors in law are corrected by rights of appeal and otherwise."

X.

The Court erred in overruling defendants' motion in arrest of judgment, which said motion was in words and figures as follows:

"In the District Court for the Territory of Alaska, Division Number One, at Juneau.

UNITED STATES OF AMERICA

vs.

STEVE STANWORTH and Mrs. STEVE STANWORTH,

Defendants.

MOTION IN ARREST OF JUDGMENT.

Come now the defendants in the above-entitled action and move the Court that no judgment be rendered upon the verdict of guilty heretofore on the 8th day of January, 1930, rendered in the above-entitled action, and that the judgment heretofore rendered be set aside.

This motion is based on the following grounds:

That the indictment in said cause does not state facts sufficient to constitute a crime, for the reason that the Alaska Bone Dry Law, for a violation of which the defendants were convicted, has been repealed by the National Prohibition Act, in so far as the offense of possession of intoxicating liquor is concerned, that being the offense of which defendants were convicted.

This motion is based upon all the records and files in said action.

R. C. HURLEY,
GEORGE GRIGSBY,
Attorneys for Defendants.

Service admitted Jan. 14, 1930.

G. W. FOLTS,
Asst. United States Attorney." [104]

XI.

The Court erred in overruling defendants' exception and objection to the verdict of the jury whereby the defendants were found guilty of the crime of possession of intoxicating liquor; said objection being based upon the ground that the same was contrary to law, contrary to the evidence and not supported by the evidence.

XII.

The Court erred in overruling the objection of the defendants to the judgment and sentence pronounced against the defendants, on the ground that said sentences were pronounced before the time had expired within which a motion for a new trial and motion for arrest of judgment might be filed.

XIII.

The Court erred in overruling the motion of defendants made at the conclusion of the Government's case, that the Court direct a verdict of not guilty on each count of the indictment; said motion being based on the ground that there was not sufficient evidence to go to the jury to sustain a conviction on either count.

GEORGE GRIGSBY,
Attorney for Defendants.

Service admitted this 18th day of March, 1930.
G. W. FOLTA,
Asst. U. S. Attorney.

Filed Mar. 18, 1930. [105]

[Title of Court and Cause.]

PETITION FOR AN APPEAL AND ORDER ALLOWING SAME.

Steve Stanworth and Mrs. Steve Stanworth, defendants in the above-entitled action, and appellants therein, feeling themselves aggrieved by the verdict of the jury and the judgment rendered therein on the 13th day of January, 1930, come now by their attorney, George B. Grigsby, Esq., and petition the Court for an order allowing said defendants to prosecute an appeal from said judgment, and the whole and every part thereof, to the United States Circuit Court of Appeals of the Ninth Circuit, under and in accordance with the laws of the United States in that behalf made and

provided and that a citation may issue and a transcript of record be sent to the Appellate Court; also that an order be made fixing the amount of bond which the defendants shall give and furnish upon said appeal, and that upon the giving of such security all further proceedings in the above-entitled court be suspended and stayed until the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

GEORGE GRIGSBY,
Attorney for Defendants. [106]

And now, to wit, on the 18th day of March, 1930, IT IS ORDERED, that the appeal herein be allowed as above prayed for, and all proceedings herein be suspended upon condition that the defendant Steve Stanworth be admitted *to in* the sum of one thousand five hundred dollars ($1500.00), and that the defendant, Mrs. Steve Stanworth, furnish proper supersedeas bond in the sum of one thousand two hundred fifty dollars ($1,250.00).

JUSTIN W. HARDING,
District Judge.

Service of the within petition admitted this 18th day of March, 1930.

G. W. FOLTA,
Asst. U. S. Attorney.

Filed Mar. 18, 1930.
Entered Court Journal No. 5, page 438. [107]

[Title of Court and Cause.]

CITATION ON APPEAL.

The President of the United States of America, to the United States of America and HOWARD D. STABLER, United States Attorney for the First Division of the Territory of Alaska, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, in the State of California, within thirty days from and after this date, pursuant to an appeal filed in the Clerk's office of the District Court for the District of Alaska, Division Number One, in the above-entitled cause, wherein Steve Stanworth and Mrs. Steve Stanworth are appellants and the United States of America is appellee, to show cause, if any there be, why the judgment in the petition for an appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

WITNESS, the Honorable CHARLES EVANS HUGHES, Chief Justice of the United States Supreme Court of the United States of America, this 18th day of March, A. D. 1930, and of the Inde-

pendence of the United States the one hundred and fifty-third.

JUSTIN W. HARDING,
Judge of the District Court, Territory of Alaska, First Division.

[Seal] Attest: JOHN H. DUNN,
Clerk of the Dist. Court.

Filed Mar. 18, 1930. [108]

Service of the foregoing citation hereby admitted this 18th day of March, 1930.

G. W. FOLTA,
Asst. United States Attorney. [109]

[Title of Court and Cause.]

SUPERSEDEAS BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, That we, Mrs. Steve Stanworth, of Juneau, Alaska, the above-named defendant, as principal, and Mose Merriweather and J. S. MacKinnon, of Juneau, Alaska, as sureties, are held and firmly bound unto the United States of America, in the sum of twelve hundred and fifty dollars ($1250.00), for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents.

Signed and sealed at Juneau, Alaska, March 18th, 1930.

THE CONDITION of the above obligation is such, THAT WHEREAS the above-named principal and defendant, Mrs. Steve Stanworth, is about

to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled court, rendered and entered in said court on January 13th, 1930, whereby and by the terms of which said defendant was sentenced to pay a fine of one thousand dollars ($1,000.00) and to be committed to the Federal jail in default of payment of said fine, not exceeding the period of one day for each two dollars ($2.00) of said fine, said defendant having theretofore been convicted of possession of intoxicating liquor in violation of the Alaska Bone Dry Act,— [110]

NOW, THEREFORE, if the said defendant, Mrs. Steve Stanworth, shall prosecute said appeal to effect, and answer all damages if she shall fail to make good her plea, then this obligation shall be void; otherwise to remain in full force and effect.

MRS. STEVE STANWORTH,
Principal.

MOSE MERRIWEATHER,
Surety.

J. S. MACKINNON,
Surety.

The United States of America,
Territory of Alaska,—ss.

Mose Merriweather and J. S. MacKinnon, being first duly sworn each for himself and not one for the other deposes and says: That he is a resident of the Territory of Alaska; that he is not an attorney or counsellor at law, marshal, clerk of any court, nor other officer of any court; that he is

worth the sum of one thousand two hundred and fifty dollars ($1,250) over and above all just debts and liabilities and exclusive of property exempt from execution.

MOSE MERRIWEATHER.
J. S. MacKINNON.

Subscribed and sworn to before me this 18th day of March, 1930.

[Seal] A. W. FOX.

Approved to operate a supersedeas.

JUSTIN W. HARDING,
District Judge.

Filed Mar. 18, 1930. [111]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To John H. Dunn, Clerk of the District Court for the First Division, Territory of Alaska:

Please prepare certified copies for transmission to the Circuit Court of Appeals in connection with your return on the citation herein, as follows:

1. Indictment.
2. Instructions to jury.
3. Verdicts.
4. Motion for new trial.
5. Judgment and sentence.
6. Bill of exceptions.
7. Motion in arrest of judgment.
8. Order overruling motion for new trial.

9. Order overruling motion in arrest of judgment.
10. Assignment of errors.
11. Petition for appeal and order allowing appeal.
12. Citation.
13. Supersedeas bond on appeal.
14. This praecipe.

Dated at Juneau, Alaska, April 3d, 1930.

GEORGE GRIGSBY,
Attorney for Defendants.

Service accepted April 3d, 1930.

G. W. FOLTA,
United States Attorney.

Filed Apr. 2, 1930. [112]

[Title of Court.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Alaska,
Division No. 1,—ss.

I, John H. Dunn, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 112 pages of typewritten matter, numbered from 1 to 112, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record, as per the praecipe of appellants on file herein and made a part hereof, in a cause wherein Steve Stanworth and Mrs. Steve Stanworth are the appellants,

and the United States of America is Appellee, No. 2023–B., as the same appears of record and on file in my office, and that said record is by virtue of a petition for appeal and citation issued in this cause and the return thereof in accordance therewith.

I do further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to Forty-four and 85/100 Dollars ($44.85), has been paid to me by counsel for appellant.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 4th day of April, 1930.

[Seal] JOHN H. DUNN,
Clerk.

By ————————————,
Deputy. [113]

[Endorsed]: No. 6123. United States Circuit Court of Appeals for the Ninth Circuit. Steve Stanworth and Mrs. Steve Stanworth, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Division No. 1.

Filed April 14, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6123

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STEVE STANWORTH and MRS. STEVE STANWORTH,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' OPENING BRIEF.

Upon Appeal from the United States District Court for the Territory of Alaska, Division Number One.

GEORGE B. GRIGSBY,
Ketchikan, Alaska,
Attorney for Appellants.

ROBERT W. JENNINGS,
San Francisco, Calif.,
Of Counsel.

Parker Printing Company, 545 Sansome Street, San Francisco

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No. 6123

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STEVE STANWORTH and MRS. STEVE STANWORTH,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' OPENING BRIEF.

Upon Appeal from the United States District Court for the Territory of Alaska, Division Number One.

STATEMENT.

The indictment charges that on October 25, 1929, defendants (appellants here) had in their possession and under their control, in Alaska, certain intoxicating liquor—in violation of the Alaska Bone Dry Law (39 Stat. Ch. 53, p. 903).

Defendants having been convicted, one was fined $1000 and the other was sentenced to jail imprisonment for eight months: both defendants appeal.

ON MOTION TO DISMISS THE APPEAL.

Appellee has filed a motion to dismiss the appeal; alleging, as a ground therefor, that under Title 28, Section 225 U. S. C. A. the cause is not appealable—in that the offense charged is not punishable by imprisonment for a term exceeding one year and in that neither the Constitution nor any treaty or statute of the United States is involved.

Appellants contend that the motion should be denied, for the reason that the validity of the Alaska Bone Dry Law is in issue and said law is a statute of the United States; it having been passed by *Congress:* it is certainly *not* a law of any territory or of any state; and the fact that the law is *applicable* only to Alaska does not at all affect its fatherhood.

ON THE MERITS.

The question involved is this, to-wit:

> Has the Alaska Bone Dry Law been repealed by the National Prohibition Act: at least so far as concerns the punishment for mere possession of liquor?

The question is pertinent because under the National Prohibition Act the punishment for mere possession is a fine not exceeding $500 whereas under the Alaska Bone Dry Law the punishment may be a fine not exceeding $1000, and/or imprisonment not exceeding

one year—and the punishment imposed in the case at bar exceeds the punishment prescribed by the National Prohibition Act. The question was raised by Motion in Arrest of Judgment (P. R. p. 113) and Assignment

Reason For Asking a Re-Examination of the Question.

In four cases this court has answered in the negative the question propounded in the above heading; and we would not have the hardihood to trespass upon the time and attention of this busy tribunal by again presenting the matter, were it not for the fact that a change has been wrought in the National Prohibition Act which we hope, and think we have reason to believe, will induce the court to view the matter in a different light; and in this hope and belief we are encouraged by the reflection that by the said decisions no rules of property were established, and that no vested interests will be affected by a modification of, or an entire receding from, those decisions.

The four cases to which we have referred, are—in chronological order:

Abatte v. U. S. (270 Fed. 735)—decided Feb. 14, 1921—Judges Gilbert, Ross and Hunt sitting.—Opinion by Judge Gilbert: *Judge Ross dissenting.*

Koppitz v. U. S. (272 Fed. 96)—decided April 4, 1921—Judges Gilbert, Hunt and Wolverton sitting.—Opinion by Judge Hunt.

Simpson v. U. S. (290 Fed. 963)—decided May 28, 1923—Judges Gilbert, Rudkin and Wolverton sitting.—Opinion by Judge Rudkin.

Peterson v. U. S. (297 Fed. 1000)—decided April 21, 1924.—Judges Gilbert, Hunt and Rudkin sitting.—Opinion by Judge Hunt.

Of these cases, only the *Abatte* case goes into the question at any length: the other cases are all founded on that case and for the most part consist of only reaffirmations.

Genesis of the Alaska Bone Dry Law. The Presence In Alaska of Indians Was Simply An Existing Condition, But Not a Cause For That Enactment.

The opinion in the *Abatte* case is based on the inefficacy of the ordinary general statute to repeal a special statute—the argument being that the Alaska Bone Dry Law was a special statute enacted by Congress for Alaska "in pursuit of its policy of prohibition in Indian Country" (Report p. 736).

It is an error, we think, to assert that the motif for the enactment of the Alaska Bone Dry Law is to be found in the desire of Congress to keep whiskey out of "Indian Country". Alaska is not, and never has been, "Indian Country", in the generally accepted sense of the term "Indian Country" (*Kie v. U. S.*, 27 Fed. 371); and although undoubtedly Congress *could* treat Alaska as Indian Country is treated

(*U. S. v. Nelson* (29 Fed. 202) and "in the early days" *did* so treat it (in that soon after the acquisition of Alaska a law was enacted absolutely prohibiting the *bringing in* of liquor) yet such treatment ceased long before the enactment of the Alaska Bone Dry Law.

The cessation of such treatment was due to the changed conditions wrought by the great influx of population—the result of the extensive gold discoveries. By the year 1899 Alaska had become essentially "White Man Country"—with cities and towns, courts, churches, schools, newspapers, libraries, civic pride, public spirit and "all which adorns and embellishes civilized life". When these facts dawned upon Congress, that body recognized the changed conditions by giving Alaska a complete Civil and Criminal Code. Gone then was any idea that Alaska was to be treated as "Indian Country" was treated, with respect to the introduction of liquor therein; for the inhibition formerly on the Statute Books against the introduction of liquor into Alaska was repealed—not expressly repealed, it is true, but impliedly repealed by the enactment of absolutely incompatible legislation, viz.: A law was passed in 1899 ushering in a kind of *local option* for Alaska (see Compiled Laws of Alaska 1913, Sec. 2571 et seq.) and by said law both wholesale and retail liquor licenses were provided for; the licenses were to be issued by the judges of the courts on application showing that "a majority of the white male and female citizens over the age of

twenty-one years, within two miles of the place where intoxicating liquor is to be *manufactured,* bartered, sold or exchanged have in good faith consented": the license for wholesale liquor business was fixed at the sum of $2000,—that for bar rooms at $1000 (idem Secs. 2573, 2575). The sums derived from liquor licenses in incorporated towns were to inure to said town "for school and municipal purposes" (idem Sec. 630) and the sums derived from liquor licenses outside of incorporated towns were also to be devoted to public purposes (idem Secs. 305, 308). There were no restrictions except that liquor was not to be sold within a specified distance from a school or church (idem Sec. 2584) nor to a minor, an Indian or an intoxicated person (idem Sec. 2575) nor should women or minors be allowed to frequent saloons (idem Sec. 2574—sixth). It will be noted that the restrictions were not substantially different from those which obtained in many of the states—notably Oregon and Washington.

Under this law of Congress many licenses were issued, and the system continued without interruption or modification until the enactment in 1917 by Congress of the Alaska Bone Dry Law—effective January 1, 1918.

The origin of the Alaska Bone Dry Law was this, to-wit: in 1912 Congress had given Alaska a legislature and by 1914 Alaska had succumbed to the agitation for prohibition which was even then sweeping state after state. So that the legislature caused

a referendum to be had on the question of Wet and Dry: the Drys carried the day, and the legislature of 1915 petitioned *Congress* for a Dry Law, the *territory* being constitutionally unable to enact such a law (Alaska Session Laws 1915, Ch. 7, p. 7). The Alaska Bone Dry Law was the result of that petition. That law ante-dated the Volstead act by twenty months.

The eighteenth amendment had not been promulgated when the Alaska Bone Dry Law was passed but it was very evident that it soon would be promulgated, and the Alaska law was a kind of "foretaste" of the legislation which the Dry forces of the country had it in mind to cause Congress to enact when the power should have been given to that body—indeed the Alaska Bone Dry Law is so similar in so much of its verbiage and in so many of its provisions as to warrant the belief that he who drafted that Act also drafted the Volstead Act;—certainly the inspiration was the same—an inspiration born of the belief that intoxicating liquors should be forbidden to *all*—a belief that had no particular reference to Americans, Frenchmen, Germans, Indians, Negroes or any race, nationality or sex. Congress, of course, had the power to pass a prohibition law for Alaska even without the Eighteenth Amendment and, as we have seen, did pass such an Act in the Alaska Bone Dry Law; but the point we wish to stress is that it was not moved thereto by any solicitude lest liquor get into the hands of Indians. We think it apparent that if

the National Prohibition Act had been in force in Alaska at the time when the Alaska Bone Dry Law was being considered, the Alaska Bone Dry Law would never have been passed. There would have been no occasion for any such law; for the conditions in Alaska were no different from the conditions in the states (else Congress would never have passed the law, licensing saloons and breweries in Alaska) and the National Prohibition Act would have covered the whole ground—have met every emergency.

There is then no particular significance in the fact that the Alaska Bone Dry Law punishes the possession in Alaska of liquor, more severely than does the National Prohibition Act; it just happened that the Alaska law was passed first: true there were Indians in Alaska at the time but there is no more reason for saying that that fact was the *cause* of the Alaska Bone Dry Law than there is for saying that the presence of Indians in the United States was the cause of the National Prohibition Act.

Special Statute—General Statute.

The Alaska Bone Dry Law was a *special* (i. e. local) statute by virtue of the fact only that it applied only to Alaska; but it applied only to *Alaska* because Alaska had petitioned for a prohibition law and because Alaska was under the sole jurisdiction of Congress. It was a special—i. e. local—statute because

at the time of its enactment Congress had not the power to pass *any* prohibition law except a special statute applicable to territory under its sole jurisdiction.

Subsequently, however, the adoption of the eighteenth amendment endowed Congress with the power to pass a general prohibition law and Congress then passed the National Prohibition Act (in its original form). But the National Prohibition Act (in its original form) contained no *express* provision that it should apply to Alaska or to any other Territory; and, this being the condition at the time of the decision in the *Abatte* case, Judge Gilbert (who rendered the decision in that case) asked this question, to-wit:

> "What is there to show that the National Prohibition Act was intended to replace the Alaska Bone Dry Act? It is not to be found in the statute, which provides that the Constitution of the United States and all the laws thereof 'which are not locally inapplicable' shall have the same force and effect within the said territory as elsewhere in the United States. That is a general provision which is found in the organic act of all the territories. It is simply an extension of the laws of the United States to the territory. It does not stand in the way of or affect the construction of special congressional legislation solely for the territory."

Abatte v. U. S., 270 Fed. 763, 766.

The correct answer to Judge Gilbert's question, as and when propounded, well might be "Nothing"; and yet, if there had then been in the Volstead Act a clause expressly stating that

> "This Act shall apply *not only* to the United States but to all territory subject to its jurisdiction",

we apprehend that the question would never have been asked, or that if asked the correct answer would *not* have been "Nothing"; we think the then correct answer would have been evidenced by that very clause—and this, because a provision that "This Act shall apply to all territory subject to its (the United States') jurisdiction" would make the act apply to Alaska *just as pointedly—just the same*—as if Alaska had been specifically mentioned; for Alaska is "territory subject to its jurisdiction" and "the whole includes all of its parts" (*Hartford v. Hartford,* 34 A. 483—Conn.).

WILLIS-CAMPBELL ACT:

How then if Judge Gilbert's question were asked today? We think the correct answer would not be "Nothing", for on November 23, 1921 (after the decision in the *Abatte* case) Congress passed the Willis-Campbell Act (42 Stats. L. 223) by which it was provided:

> "Sec. 3. That this Act *and the National Prohibition Act* shall apply not only to the United

States *but to all territory subject to its jurisdiction* including Hawaii and the Virgin Islands."

(This section 3 now appears as Section 2 of the National Prohibition Act—see Section 2, Title 28, U. S. C. A.)

In the passing of the Willis-Campbell Act Congress will be presumed to have been cognizant of the *Abatte* case (and other adjudications) by which the National Prohibition Act had been held to be inapplicable to Alaska (and other places), and that Act (Willis-Campbell) is indicative of the desire of Congress to forestall any such future decision. Can there be any doubt that by this *express* extension Congress intended to establish a Federal Uniform Prohibition Act of ubiquitous application? Indeed the Supreme Court has said that the object, purpose and effect of said Section 3 of the Willis-Campbell Act was to make the field of operation of the National Prohibition Act "to coincide with that of the 18th Amendment" (*Cunard S. S. Co. v. Mellon,* 262 U. S. 100, 67 L. Ed. 904, middle 1st Col.).

In the light of all these facts it would seem to be futile to *now* plant the contention that the Alaska Bone Dry Law has not been repealed (at least so far as the punishment for possession is concerned) by the National Prohibition Act, on the distinction between a special statute and a general statute; for such distinction cannot obtain where both statutes are by the one sovereignty, on the same subject, bear on all

the people and are equally applicable to the same territory. The Alaska Bone Dry Law is not aimed at any evil which the National Prohibition Act does not take care of.

The situation then is this, to-wit: here are two statutes making it a crime to possess whiskey in Alaska, viz., the Alaska Bone Dry Law *passed by Congress in 1917* and prescribing a punishment by fine not exceeding $1000 or imprisonment not exceeding one year or both fine and imprisonment, *and* the National Prohibition Law *passed by Congress in 1919* (and its supplementary Act) prescribing a punishment only by fine not exceeding $500. Is there not a conflict? and does not the later statute repeal the former to the extent of the conflict? Here the offense charged is the possession of liquor in Alaska and

> "Where a statute prohibits a particular act and imposes a penalty for doing it and a subsequent statute imposes a different penalty for the same offense, the latter statute operates by way of substitution and repeals the former and this whether the penalty is increased or diminished."
>
> 36 *Cyc.,* p. 1096, text and note 33-35-36, 128 Fed. 207, *U. S. v. One Bay Horse.*

The reason of course is that to the extent of the penalty at least there is a conflict.

Speaking of the repeal of a special or local statute by a general statute, it is said that that matter is after all *"a question of intention"* and that

"Such intention may also be made to appear by the words of the general act, by the subject-matter with which the general act is concerned, by other legislation on the same matter, by the surrounding circumstances, *by the purpose to be accomplished,* or by anything else to which reference may properly be had for the purpose of discovering the legislative intent. Thus where the clear general intent of the legislature *is to establish a uniform system throughout the state,* the presumption must be that local acts are intended to be repealed. *So also where an act is passed to carry into effect a general mandatory provision of the constitution all acts inconsistent therewith, although local, are repealed.*"

36 *Cyc.,* p. 1089, text and note 99 et seq.

Suppose for instance the case were reversed; that is to say, suppose the Alaska Bone Dry Law had never been enacted and the 18th Amendment had never been adopted; the situation in Alaska would have been this, to-wit:

There was a *special* (i. e., a local) statute of Congress allowing and licensing the sale and manufacture (and therefore the possession) in Alaska of whiskey, wine and beer (Compiled Laws of Alaska 1913, Sec. 2571 et seq.); while this Act is in full force Congress passes an Act *forbidding* the manufacture and/or sale and/or possession of liquor and provides therein that "said act shall apply to *all* the territory subject to the jurisdiction of the United States", could there then be

> any question that the former licensing act was repealed? We apprehend not; and yet the licensing act was a *special* (i. e., a local) statute and the supposedly new statute would be *in form* a general statute. The fact is, however, that a statute which by its terms applies *everywhere* is *ex vi termini* as much a special statute as it is a general statute—that is to say that the very universalness of the statute obliterates the distinction between General and Special; so that, in the given case we would not have a conflict between a Special Statute and a General Statute, but rather a conflict between two statutes of equal rank so far as Alaska is concerned; and as the latest enacted statute completely covers the subject matter of the former statute and was enacted by the same sovereignty it acts as a substitute, so far at least as concerns the punishment for an offense denounced by both statutes.

The *Abatte* and the *Koppitz* cases (supra) were decided *before* the passage of the Willis-Campbell Act. It is true that the *Simpson* case (supra) was decided *after* the passage of the Willis-Campbell act and yet follows the *Abatte* case; but it does not appear that the Willis-Campbell Act was at all brought to the attention of the court and it might well have been overlooked on account of the fact that its section 3 appears in some prints as section 2 of the National Prohibition Act as if it had been enacted at the same time as, and was a part of, the original National Pro-

hibition Act. In the *Peterson* case, however, the Willis-Campbell Act is mentioned and still the decision follows the *Abatte* case; but no authorities are cited, no reasoning given in the decision for the preserving of the *status quo ante;* and we cannot refrain from thinking that the decision in the *Peterson* case was based largely on the erroneous statements in the *Abatte* case which we have pointed out. In none of the said cases was it at any time brought to the attention of the court that Congress had abandoned the "Indian Country" idea that liquor should not be brought into Alaska, and had adopted instead the "Local Option" system for Alaska, and had continued that system down to the time of the enactment of the Bone Dry Law: on the contrary, Judge Gilbert in the *Abatte* case (speaking of the policy forbidding importation of liquor into Alaska) erroneously states:

> "and it was continued without interruption until the enactment of the Bone Dry Law" (*Abatte* case —page 270 Fed. 2nd par. on p. 73 B).

To conclude: The "Local Option" Act expressly sanctioned the manufacture, sale and possession of liquor in Alaska: the Bone Dry Act (a subsequent enactment) repeals the local option act and establishes prohibition; the National Prohibition Act (a subsequent statute) is a later enactment applicable to Alaska dealing with the subject of prohibition full, complete and drastic; and it is a substitute for the Bone Dry Act; for it was "passed to carry into effect a general mandatory provision of the Constitution and all acts

in conflict therewith although local are repealed." (36 *Cyc.* p. 1089, supra p. 13).

We trust then that the court will "not take it amiss" if we urge a reexamination of the question as to whether or not the Alaska Bone Dry Law has been repealed by the National Prohibition Act—at least to the extent of lessening the punishment for the mere *possession* in Alaska of intoxicating liquors. We urge

(I) That the judgment be reversed *in toto.*

(II) If not reversed *in toto,* then that the cause be remanded with instructions to sentence defendants only under the National Prohibition Act—as suggested by Judge Ross in the *Abatte* case (270 Fed. p. 740, last two paragraphs of his dissenting opinion).

Respectfully submitted,

GEORGE B. GRIGSBY,
Ketchikan, Alaska,
Attorney for Appellants.

ROBERT W. JENNINGS,
San Francisco, Calif.,
Of Counsel.

No. 6123

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STEVE STANWORTH and
MRS. STEVE STANWORTH,
Appellants.

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the District of Alaska. Division Number One.

Brief of Appellee

HOWARD D. STABLER,
United States Attorney,
For Appellee.

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CITATIONS

STATUTES

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STEVE STANWORTH and MRS. STEVE STANWORTH, *Appellants.* vs. THE UNITED STATES OF AMERICA, *Appellee.*	No. 6123

Brief of Appellee

STATEMENT OF CASE

In this case appellants, hereinafter called defendants, were jointly charged with violation of the prohibition laws by indictment in two counts whereof (Trans. pp. 1, 2) the first count charged unlawful possession of intoxicating liquor in violation of the Alaska Bone Dry Act (39 Stat. 903, Chapter 53; 48 U. S. C. A. 261) and the second count charged the keeping of a liquor nuisance in violation of The National Prohibition Act.

The defendants were jointly tried and convicted of possessing intoxicating liquor in violation of the Alaska Bone Dry Act. (Trans. pp. 13, 14) as charged in count one of the indictment; and they were both acquitted of keeping the liquor nuisance as charged in count two of the indictment. They have both appealed from the conviction under count one to this court.

THE MOTION TO DISMISS THE APPEAL.

Appellee, on or about October 1, 1930, filed in this court a motion to dismiss the appeal for want of appellate jurisdiction. The motion was duly served upon counsel of record for the appellants. It is as follows:

> "Comes now United States of America, appellee in the above entitled court and cause, by Howard D. Stabler, United States Attorney for the First Division, District of Alaska, and by virtue of the provisions of the third subdivision of Section 128 of the Judicial Code, as amended by the Act of Congress approved February 13, 1925, 43 Stat. 936, 28 U. S. C. A. 225, U. S. Comp. Stat. 1120, as amended, respectfully moves the court to dismiss for want of appellate jurisdiction the above entitled pretended appeal of Steve Stanworth et ux., versus United States of America, No. 6123, from the final judgment (pp. 16, 17, 18 Trans.) of the District Court for the First Division, District of Alaska, for

the reason that the Constitution of the United States, nor any statute or treaty of the United States, or any authority exercised thereunder, is not involved; the value in controversy exclusive of interest and costs does not exceed One Thousand ($1000.00) Dollars; the offense charged is not punishable by imprisonment for a term exceeding one year or by death; and said proceeding is not a habeas corpus proceeding."

ARGUMENT ON MOTION TO DISMISS

Upon authority of the case of Starklof versus U. S., 20 Fed. (2d) 32, decided by this court in 1927, the appeal ought to be dismissed.

The statute which defines the crime whereof the defendants were convicted is Section One of the Alaska Bone Dry Act enacted by Congress for the Territory of Alaska. It is not a statute of the United States as contemplated by the third subdivision of the statute (28 U. S. C. A. 225) fixing the appellate jurisdiction in cases from Alaska.

In the Starklof case the court held that an act of the territorial legislature is a law of the territory and not a law of the United States.

In the case of Abbate v. U. S., 270 F. 735, this court said:

"In legislating for a territory Congress exercises the combined powers of a national and state government. The Bone Dry Law of Alaska stands upon the same footing it

> would have had it been enacted by a territorial legislature created by Congress."

Nor is the offense charged punishable by imprisonment for a term exceeding one year or by death. The maximum punishment which could be imposed for the crime whereof the defendants were charged and convicted is not more than one year's imprisonment and $1000.00 fine, or both (48 U. S. C. A. 261).

The case is not a habeas corpus proceeding. No treaty, or authority exercised thereunder, is involved. Nor is any constitutional question involved. The only matter in the case which might refer to the Constitution is found on pages 19, 20, 116 and 117 of the transcript, the substance whereof is shown by the following found on page 19:

> "We object to any further evidence as to what he did under a search warrant, he having testified that he had a search warrant, until it has been shown to the court it is a valid search warrant based on sufficient evidence."

We think the question involved by the objection cannot be construed as a constitutional question. The words "Constitution is involved" found in the Act of February 13, 1925, (28 U. S. C. A. 225) have been used in other statutes, and have often been construed by the courts.

In Ansbro v. U. S., 159 U. S. 695, 697, 698, 16 Sup. Ct. 187, the Supreme Court of the United States by Mr. Chief Justice Fuller said:

> "A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege or immunity is claimed under that instrument, but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such claim by its decision."
>
> See also Sugerman v. U. S., 249 U. S. 182, 183, 184, 39 Sup. Ct. 191,
> Itow v. U. S., 233 U. S. 581, 584, 34 Sup. Ct. 699,
>
> State of Arkansas v. Schlurholz, 179 U. S. 598, 21 Sup. Ct. 229, 231,
> 25 Corpus Juris 913, section 263."

It is respectfully submitted that by virtue of the provisions of the Act of February 13, 1925, (28 U. S. C. A. 225) the court has not jurisdiction to review the case on appeal; and, therefore, the appeal ought to be dismissed.

ARGUMENT ON THE MERITS.

Defendants contend their Motion in Arrest of Judgment (Trans. pp. 111, 113), based upon the

statutory ground (Sections 2199, 2282 Compiled Laws of Alaska) "that the facts stated do not constitute a crime," raises an issue which gives this court appellate jurisdiction to review their case.

This contention is grounded upon the following conclusions: The indictment does not state a crime because it charges possession of intoxicating liquor in violation of the Alaska Bone Dry Act which is repealed, at least as far as possession of intoxicating liquor is concerned, by the National Prohibition Act; and the Alaska Bone Dry Act is a statute of the United States within the meaning of the Act of February 13, 1925 (28 U. S. C. A. 225); therefore, the court has appellate jurisdiction to review their case.

In appellee's argument on the Motion to Dismiss the Appeal for want of appellate jurisdiction, the point was made that the Alaska Bone Dry Act is not a statute of the United States within the meaning of the Act of February 13, 1925.

Defendants, however, with considerable confidence, assert it is, and with equal confidence contend their Motion in Arrest of Judgment is sufficient to get the case before the court for review upon the merits.

A review of the case on the merits will show defendants' arguments untenable.

It is well settled the Alaska Bone Dry Act was

not repealed by the National Prohibition Act. Every point raised by defendants has been before the court; and it should not be necessary for appellee to do more than call the court's attention to cases wherein defendants' arguments are refuted.

In Abbate v. U. S., 270 F. 735 (CCA-9) decided in 1921, Abbate was convicted of possessing intoxicating liquor in violation of the Alaska Bone Dry Act, and a sentence of three months in jail and a fine of $800.00 was imposed. The contention was made in this court, as is now made again, that because the maximum punishment for illegal possession of intoxicating liquor under the National Act was only $500.00 fine for a first offense, the Bone Dry Act was repealed. The court affirmed the conviction under the Alaska Dry Act.

When the case of Koppitz v. U. S., 272 F. 96, (CCA-9), decided later in 1921, came before the court, the court said the objection that the Alaska Bone Dry Act was repealed by the National Prohibition Act was not well founded.

In 1923, the question again came before the court in Simpson v. U. S. 290 F. 963 (CCA-9) (Cer den. 263 U. S. 707). In an opinion written by Judge Rudkin the court said:

> "The validity of the Alaska Bone Dry Act has been twice affirmed by this court, and the question is no longer an open one here."

The effect of the Supplemental Act to the Na-

tional Prohibition Act on the Alaska Dry Law was considered by the court in 1924 in the case of Peterson v. U. S. (CCA-9) 297 F. 1000, 1001. In the opinion written by Judge Hunt, the court said:

> "The provisions of the supplemental act do not repeal the Alaska dry law. The two laws, National Prohibition Act and Alaska dry law, are in force in Alaska, with the qualification that if there are inconsistencies in any of their provisions, the National Prohibition Act must prevail."

In 1926, the matter came before the court again in U. S. v. Berkness, 16 F. (2d) 115, (CCA-9) upon the point of whether a search warrant issued under the Alaska dry act for a private dwelling was sufficient. The affidavit upon which the warrant was based did not allege a sale of intoxicating liquors, a requirement mandatory under the National Prohibition Act, but not required by the Alaska dry act. The court again held both acts in force in Alaska,

> "with the qualification that if there are inconsistencies in any of their provisions, the National Prohibition Act must prevail."

In making this last statement the court must have known the penalties for nearly all offenses denounced by the Alaska dry act are more drastic than the penalties for similar offenses under

the National Act. It is apparent, however, the court considered the difference in penalties not an inconsistency sufficient to effect a repeal of the Alaska act, for in the Berkness case the court said:

> "The inconsistency which will nullify the law applicable to the local territory must be one concerned with the main purpose of the National Act, so that its effect upon a right conferred or restriction declared will be to diminish or relax either. Intoxicating liquor, by permit, may be possessed under the terms of either act for certain purposes. Under neither act may intoxicating liquor be otherwise possessed."

The court then held that warrants under the Alaska act for search of private dwellings must conform to the limitation placed upon search of private dwellings by the National Act.

The case went to the Supreme Court, U. S. v. Berkness, 275 U. S. 149,155. The Supreme Court said:

> "The court below held that by the legislation subsequent to the Act of February 14, 1917, (Alaska Bone Dry Act) Congress impased 'a limitation on the right to search a private dwelling which is available to residents of Alaska equally with those in other portions of the United States'; and we approve that conclusion . . . The emphatic

> declaration that no private dwelling shall be searched except under specified circumstances, discloses a general policy to protect the home against intrusion through the use of search warrants . . . The provision of the earlier special Act is hostile to the later declaration of Congress and must give way."

From the language used in the Berkness case, in this court and in the Supreme Court, the conclusion seems irresistible that inconsistency between the two acts, to effect a repeal, must be considerably more than a difference in penalties for similar offenses denounced by both acts. The inconsistency which will nullify the Alaska Act, "must be one concerned with the main purpose of the National Act," as said by this court; inconsistency in a general policy of the National Act, as said by the Supreme Court.

Counsel furnishes us an illustration of such an inconsistency with the main purpose or general policy that would effect repeal at pages 13 and 14 of defendants' brief, where is said:

> "Suppose there was a special (i. e., a local) statute of Congress allowing and licensing the sale and manufacture (and therefore the possession) in Alaska of whisky, wine and beer; and while this act is in full force Congress passes an act forbidding the manufacture and/or sale and/or possession of liquor and provides therein that said act shall apply to all the territory subject to the jurisdiction

> of the United States, could there then be any question that the former licensing act was repealed?"

The difference between the penalty provided for illegal possession of intoxicating liquor in violation of the Alaska dry act and that provided for the illegal possession of intoxicating liquor under the National Act, is far short of being such an inconsistency as is found in the illustration. Difference in penalty is not an inconsistency concerned with the main purpose, or general policy, of the National Act, as contemplated in the decisions of this court and of the Supreme Court; therefore the penalty provided by the Alaska Act for illegal possession of intoxicating liquor is not repealed by the National Act.

CONCLUSION

Appellee respectfully contends:

1. That the appeal ought to be dismissed for want of appellate jurisdiction; and the judgment of the trial court affirmed.

2. That the Alaska Bone Dry Act, and the penalty therein provided for illegal possession of intoxicating liquor, is not repealed by the National Act; and defendants' conviction for violation of the Alaska dry act ought to be affirmed.

Respectfully submitted,

HOWARD D. STABLER,

United States Attorney.

No. 6124

United States
Circuit Court of Appeals
For the Ninth Circuit.

PETER CONNLEY and HERMAN F. QUIRIN,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
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PETER CONNLEY and HERMAN F. QUIRIN,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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United States of America, ss.

To THE UNITED STATES OF AMERICA, and to SAMUEL W. McNABB, United States Attorney for the Southern District of California, and J. GEORGE OHANNESIAN, Assistant United States Attorney: Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 3rd day of May, A. D. 1930, pursuant to an Order Allowing Appeal, filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action No. 9926-M Crim., wherein Peter Connley and Herman F. Quirin are the defendants and appellants and you are the plaintiff and appellee to show cause, if any there be, why the Judgment and Sentence in the said action mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN M. KILLITS United States District Judge for the Southern District of California, this 4th day of April, A. D. 1930, and of the Independence of the United States, the one hundred and fifty-fourth.

John M. Killits

U. S. District Judge for the Southern District of California.

[Endorsed]: 9926-M. Cr. In the United States Circuit Court of Appeals for the Ninth Circuit Peter Connley and Herman F. Quirin vs. United States of America Citation Received this 4th day of April, 1930. E. E. Doherty, Asst. U. S. Attorney. Filed Apr. 4, 1930. R. S. Zimmerman, Clerk by W. E. Gridley, Deputy Clerk.

No..... Filed.....

Viol: Section 37 Federal Penal Code—Conspiracy to violate Section 3, Title II of the National Prohibition Act of October 28, 1919 and Sections 3258, 3281 and 3282 United States Revised Statutes, and Section 3, Title II of the National Prohibition Act of October 28, 1919 as amended March 2nd, 1929.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

At a stated term of said court, begun and holden at the City of Los Angeles, County of Los Angeles, within and for the Central Division of the Southern District of California on the first Monday of February in the year of our Lord one thousand nine hundred thirty:

The grand jurors for the United States of America, impaneled and sworn in the Central Division of the Southern District of California, upon their oath present:

That

NICK BRUNO,
JOE VERDA,
PETER CONNLEY, alias George Walker,
HERMAN F. QUIRIN,

hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the grand jurors unknown, each late of the Central Division of the Southern District of California, heretofore, to-wit: continuously throughout the period of time from on or about the 1st day of July,

A. D. 1929, and thereafter, to and including the date of finding and presentation of this indictment, in the County of Riverside, in the state and district aforesaid and in the Central Division of said district, and within the jurisdiction of the United States and of this Honorable Court, did then and there knowingly, wilfully, unlawfully, corruptly and feloniously conspire, combine, confederate, arrange and agree together and with each other and with divers other persons whose names are to the grand jurors unknown, to commit in the County of Riverside, State of California, within the jurisdiction of the United States and of this Honorable Court, an offense against the United States of America and the laws thereof, the offense being to violate Title II of an Act of Congress of the United States approved October 28th, 1919, commonly known and designated as the National Prohibition Act, that is to say that they, the said defendants, would thereupon unlawfully, and in violation of Section 3, Title II of said Act, manufacture, transport and possess large quantities of intoxicating liquor, all of which should then and there be fit and for use for beverage purposes and all of which should contain more than one-half of one per cent of alcohol by volume, neither of said defendants then and there having, nor intending thereafter to have, a permit from the Commissioner of Internal Revenue of the United States so to do.

And the grand jurors aforesaid, upon their oath aforesaid, do further charge and present that at the hereinafter stated times, in pursuance of, and in furtherance of, in execution of, and for the purpose of carrying out and to effect the object, design and purposes of said conspiracy, combination, confederation and agreement aforesaid, the

hereinafter named defendants did commit the following overt acts at the hereinafter stated places:

1. On or about the 1st day of September, 1929, at the town of Elsinore, County of Riverside, in state and district aforesaid, and in the Central Division of said district, the defendant Herman F. Quirin purchased certain lumber from the Dill Lumber Company.

2. Between the 1st day of July 1929 and the 21st day of January 1930, all of the defendants named herein maintained and operated a certain still situated on the ranch of Nick Bruno, about five miles northeast of Elsinore, County of Riverside, in the state, division and district aforesaid.

3. On or about the 21st day of January 1930, all of the defendants named herein did possess about thirteen hundred (1300) gallons of alcohol at the said ranch of Nick Bruno, located about five miles northeast of the town of Elsinore, County of Riverside, in the state, division and district aforesaid.

4. On or about the 21st day of January 1930, at the town of Elsinore, County of Riverside, in the state, division and district aforesaid, the defendant Herman F. Quirin purchased certain lumber from the Dill Lumber Company.

5. On or about the 21st day of January 1930, the defendant Joe Verda was present at the said ranch of Nick Bruno, located about five miles northeast of Elsinore, County of Riverside, in the state, division and district aforesaid.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

SECOND COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That

NICK BRUNO,
JOE VERDA,
PETER CONNLEY, alias George Walker,
HERMAN F. QUIRIN,

hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the grand jurors unknown, each late of the Central Division of the Southern District of California, heretofore, to-wit: on or about the 20th day of January A. D. 1930, at the ranch of Nick Bruno, located about five miles northeast of the town of Elsinore, County of Riverside, in the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully, unlawfully and feloniously manufacture for beverage purposes about thirteen hundred (1300) gallons of intoxicating liquor, the exact amount being to the grand jurors unknown, then and there containing alcohol in excess of one-half of one percent by volume, in violation of Section 3, Title II of the National Prohibition Act of October 28th, 1919, as amended March 2nd, 1929;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

THIRD COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

THAT

NICK BRUNO,
JOE VERDA,
PETER CONNLEY, alias George Walker,
HERMAN F. QUIRIN,

hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the grand jurors unknown, each late of the Central Division of the Southern District of California, heretofore—to-wit: on or about the 21st day of January A. D. 1930, at the ranch of Nick Bruno, located about five miles northeast of the town of Elsinore, County of Riverside, in the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully, unlawfully and feloniously have in their possession and custody and under their control, one still and distilling apparatus set up at or near the said ranch of Nick Bruno, the legal description of which is as follows, to-wit:

The West 5 acres of Lot 2, the whole of Lot 3, the East 5 acres of Lot 4 of the Sunny Slope Division of Section 28, Township 5-S, Range 4-W, County of Riverside, State of California.

which said still and distilling apparatus had not been registered by the said defendants with the Collector of Internal Revenue for the Sixth Internal Revenue District of California, and the said defendants, at the time they did so knowingly, wilfully, unlawfully and feloniously have in their possession and custody and under their control the said still and distilling apparatus, then and there well knew that the said still and distilling apparatus had not been

registered with the said Collector of Internal Revenue as required by law;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

FOURTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That

NICK BRUNO,
JOE VERDA,
PETER CONNLEY, alias George Walker,
HERMAN F. QUIRIN,

hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the grand jurors unknown, each late of the Central Division of the Southern District of California, heretofore, to-wit: on or about the 21st day of January A. D. 1930, at the ranch of Nick Bruno, located about five miles northeast of the town of Elsinore, County of Riverside, in the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully, unlawfully and feloniously engage in and carry on the business of distillers without having given bond, as required by law, with the intent on the part of them, the said defendants, to defraud the United States of America of the tax on the spirits distilled by them, the said defendants, in violation of Section 3281 United States Revised Statutes;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

FIFTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That

NICK BRUNO,
JOE VERDA,
PETER CONNLEY, alias George Walker,
HERMAN F. QUIRIN,

hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the grand jurors unknown, each late of the Central Division of the Southern District of California, heretofore, to-wit: on or about the 21st day of January A. D. 1930, in the County of Riverside, in the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully, unlawfully and feloniously make and ferment on certain premises other than a distillery, and in a certain building other than a distillery duly authorized accordingly to law, to-wit: on the ranch of Nick Bruno, the legal description of which is as follows, to-wit:

The West 5 acres of Lot 2, the whole of Lot 3, the East 5 acres of Lot 4 of the Sunny Slope Division of Section 28, Township 5-S, Range 4-W, County of Riverside, State of California;

about fifty thousand (50,000) gallons of mash, which said mash was then and there fit for distillation and for the production of spirits, and which said mash was not then

and there intended to be used in the manufacture of vinegar exclusively or at all; in violation of Section 3282 United States Revised Statutes;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

SIXTH COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That

NICK BRUNO,
JOE VERDA,
PETER CONNLEY, alias George Walker,
HERMAN F. QUIRIN,

hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the grand jurors unknown, each late of the Central Division of the Southern District of California, heretofore, to-wit: on or about the 21st day of January A. D. 1930, at the ranch of Nick Bruno, located about five miles northeast of the town of Elsinore, County of Riverside, in the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully and unlawfully have in their possession about thirteen hundred (1300) gallons of intoxicating liquor, then and there containing alcohol in excess of one-half of one per cent by volume, for beverage purposes; in violation of Section 3, Title II, of the National Prohibition Act of October 28, 1919;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

SAMUEL W. McNABB
United States Attorney.
Gwyn S Redwine
Assistant United States Attorney.

[Endorsed]: No. 9926M United States District Court Southern District of California Central Division The United States of America vs. Nick Bruno, et al Indictment Vio: Sec. 37 F. P. C.—Conspiracy to violate Sec. 3, Title II NPA. and Secs. 3258, 3281 and 3282 R. S. and Sec. 3, Title II, NPA. as amended March 2nd, 1929. A true bill, C. M. Staub Foreman. Filed Feb 14 1930 R. S. Zimmerman, Clerk By Louis J. Somers Deputy Clerk Bail, $5000 ea.

At a stated term, to wit: The February Term, A. D. 1930, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 3rd day of March in the year of our Lord one thousand nine hundred and thirty

Present:

The Honorable John M. Killits, District Judge Pro Tem.

United States of America, Plaintiff,	
vs.	
Nick Bruno,	
Joe Verda,	No. 9926-M Crim.
Peter Connley, alias George Walker,	
Herman F. Quirin,	
Defendants.	

This cause coming before the Court for the arraignment and plea of the defendants; Gwyn Redwine, Assistant United States Attorney, appearing as counsel for the Gov-

ernment; the defendants being present with their attorney Russell Graham, Esq., state their true names to be Nick Bruno, Joe Verda, Peter Connley and Herman F. Quirin, and waive reading of the Indictment, whereupon each defendant enters his separate plea of not guilty, and it is ordered that this cause be set for March 18th, 1930 for trial of all four defendants.

At a stated term, to wit: The February Term, A. D. 1930 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 18th day of March in the year of our Lord one thousand nine hundred and thirty.

Present:

The Honorable John M. Killits, District Judge Pro Tem.

United States of America, Plaintiff,	
vs.	
Nick Bruno,	
Joe Verda,	No. 9926-M. Crim.
Peter Connley, alias George Walker	
Herman F. Quirin,	
Defendants.	

This cause coming before the Court for trial of all four defendants, J. Geo. Ohannesian, Asst. U. S. Attorney, appearing as counsel for the Government, defendants Nick Bruno and Joe Verda being present, and all other defendants being absent; Mark L. Herron, Esq. appearing as counsel for defendant Bruno and Russell Graham, Esq.

appearing as counsel for all other defendants, it is ordered that the case be continued to the hour of 2 o'clock p. m.; and witnesses are instructed to appear at said time.

At the hour of 2:25 o'clock p. m. court reconvenes, counsel being present as before and all four defendants being now present, and C. W. McClain being present as official stenographic reporter of the testimony and the proceedings; upon motion of Russell Graham, Esq., said attorney is allowed to withdraw as counsel for defendants Connley and Quirin; whereupon Attorney Clarence L. Belt, being present, states that he represents said defendants, and moves for continuance. Mark L. Herron, Esq., moves to associate Attorney Raymond Hodge for defendant Bruno, and the Court having so ordered; all witnesses herein are excused, at the hour of 2:33 o'clock p. m., until tomorrow, 10 a. m., and thereupon they having left the court room, Attorney Graham, on behalf of defendant Verda, and also for all other defendants, moves that the Government be required to elect whether it will proceed on the second or fifth count; and said motion having been denied by the Court, with exception noted for the defendants; the Court orders, at the hour of 2:35 o'clock p. m., that a jury be impanelled herein, and thereupon the following twelve names are drawn from the jury box: Robert H. Moulton, Young Wilhoite, L. W. Still, Carleton F. Burke, Edward Lawless, A. J. Hosking, Elmer E. Bailey, Louis H. Bromme, David W. Green, Kenyon L. Reynolds, R. A. Mays and Cecil J. Walden; and the said jurors whose names were drawn are called and examined by the Court; whereupon Edward Lawless is excused on peremptory challenge exercised by defendants, and one more name is drawn from the jury box, being the name L. Revel Miller, who

is called and examined for cause by the Court, and who is thereupon excused on peremptory challenge by the Government.

The name Henry Klein is now drawn from the jury box, and the said Henry Klein, having thereupon been called and examined for cause by the Court, David W. Green is excused on peremptory challenge by defendants, and it is ordered that one more name be drawn from the jury box.

The name Orman R. Goode is now drawn, and the said juror is called examined and excused for cause by the Court; whereupon the name Charles C. Stanley is drawn from the jury box, and the said Charles C. Stanley is called and examined for cause by the Court.

Henry Klein is now excused on peremptory challenge made by the Government, and it is ordered that one more name be drawn from the jury box, and a name is drawn, being that of John P. Whitmore.

John P. Whitmore is called and examined for cause by the Court and is excused on peremptory challenge by defendants; whereupon, the Court having ordered that another name be drawn, the name Harry P. Ball is drawn, and said juror is called and examined by the Court for cause; and thereafter Elmer E. Bailey having been excused on peremptory challenge by defendants, and the Court having ordered that another name be drawn, the name Fred W. Patten is drawn, and the said Fred W. Patten is called and examined for cause by the Court.

Kenyon L. Reynolds is excused on peremptory challenge by counsel for the Government, and one more name is drawn from the jury box, being the name Will J. Hess, and the said juror is called and is examined for cause by

counsel for the defendants, whereupon R. A. Mays is excused on peremptory challenge made by defendants.

The name G. R. Erdman is now drawn from the jury box, and said juror is called and examined for cause by the Court, whereupon Harry P. Ball is excused on peremptory challenge exercised by defendants, and by order of the Court, one more name is drawn from the jury box, being the name F. M. Goss; and the said F. M. Goss having thereupon been called and having been examined for cause by the Court,

G. R. Erdman is excused on peremptory challenge by defendants, and it is ordered that one more name be drawn from the jury box. The name Jno. M. Pickarts is drawn from the jury box, and said juror is called and examined for cause by the Court, whereupon Will J. Hess, is excused by the defendants on peremptory challenge, and the name C. G. Columbus is drawn; and the said C. G. Columbus having been called and having been examined and passed for cause by the Court; the jurors now in the jury box are accepted, and at the hour of 3:10 o'clock p. m., are sworn in a body as the jury to try this cause, the names of those so sworn being as follows, to-wit:

THE JURY:

Robert H. Moulton	Fred W. Patten
Young Wilhoite	Louis H. Bromme
L. W. Still	Chas. C. Stanley
Carleton F. Burke	C. G. Columbus
F. M. Goss	Jno. M. Pickarts
A. J. Hosking	Cecil J. Walden

The Court admonishes the jury that during the progress of this trial they are not to speak to anyone about this cause, or any matter or thing therewith connected; that until said cause is finally submitted to them for their deliberation under the instruction of the Court, they are not to speak to each other about this cause, or any matter or thing therewith connected, or form or express any opinion concerning the merits of the trial until it is finally submitted to them, and declares a recess until the hour of 10 o'clock a. m., tomorrow.

At a stated term, to wit: The February Term, A. D. 1930 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 19th day of March in the year of our Lord one thousand nine hundred and thirty.

The Honorable John M. Killits, District Judge Pro Tem.

United States of America, Plaintiff,	)	
vs.	)	
Nick Bruno, Joe Verda,	)	No. 9926-M Crim.
Peter Connley alias George Walker,	)	
Herman F. Quirin,	)	
Defendants.	)	

This cause coming before the Court for trial of all four defendants, J. Geo. Ohannesian and Emmett E. Doherty, Assistant U. S. Attorneys, appearing as counsel for the Government; Mark L. Herron, Esq. appearing as counsel for defendant Bruno, Russel Graham, Esq. appearing for defendant Verda and Clarence L. Belt, Esq., appearing as counsel for defendants Connley and Quirin; the de-

fendants and the jury being present; and Ross Reynolds, C. W. McClain and Ray E. Woodhouse being present as official stenographic reporters of the testimony and the proceedings, and alternating in said capacity; now, upon motion of Russell Graham, Esq., it is by the Court ordered that any objection taken on behalf of one defendant may be deemed as taken in behalf of all defendants, and that exception taken on behalf of one may be deemed as taken in behalf of all; whereupon the whole Indictment is read by the Clerk to the jury, at the request of J. Geo. Ohannesian, Esq., and thereafter, on motion of Russell Graham, Esq., all witnesses are excluded from the court room until individually called to testify excepting defendants on trial and Government, city or state officers aiding the Government.

O. G. Spencer is called and sworn and testifies for the Government on direct examination conducted by J. Geo. Ohannesian, Esq., and the following exhibits are offered and admitted in evidence for the Government, to-wit:

Government's Ex. No. 1: Pencil sketch of premises
" " " 2: Panoramic view of premises
" " " 3: " " " "

whereupon said witness is cross-examined by Mark L. Herron, Esq., and the following exhibits are thereafter offered and admitted in evidence for the Government, to-wit:

Government's Ex. No. 4: Picture of stack of hay
" " " 5: " " " " "
" " " 6: " " " " "
" " " 7: " " " " "
" " " 8: " " " " "

"	"	" 9:	"	"	two vats
"	"	" 10:	"	"	boiler
"	"	" 11:	"	"	machine room and four men
"	"	" 12:	"	"	top part of boiler
"	"	" 13:	"	"	pipes and valves, etc.

Witness Spencer is withdrawn temporarily, and right is reserved to further cross-examine said witness.

At the hour of 11:16 o'clock a. m., a recess is declared for five minutes, and at the hour of 11.25 o'clock a. m., court reconvenes, and all being present as before

Wm. P. Clements is called and sworn and testifies for the Government on direct examination conducted by Attorney Ohannesian, and is examined by the Court; whereupon said witness testifies on cross-examination conducted by Russell Graham, Esq., and the following exhibit is offered and admitted in evidence for the defendants, to-wit:

Defendants' Ex. A: Panoramic photograph

At the hour of 12 o'clock, Noon, the Court admonishes the jury, and declares a recess until the hour of 2 o'clock p. m., and at the hour of 2:05 o'clock p. m., court reconvenes, and all being present as before, Wm. P. Clements resumes the stand and is further cross-examined by Attorney Graham, and the following exhibits are offered and admitted in evidence for the defendants, to-wit:

Defendants' Ex.	B:	Panoramic	photograph	
"	" C:	"	"	
"	" D:	"	"	
"	" E:	"	"	

whereupon said witness is cross-examined by Clarence L. Belt, Esq., and thereafter having testified on redirect examination conducted by Attorney Ohannesian and having been examined by the Court, and recross-examined by Attorney Belt, the following Government's exhibit is offered and admitted in evidence, to-wit:

Government's Ex. No. 14: Rotor—part of automobile distributor.

John Alles is called and sworn and testifies for the Government on direct examination conducted by Attorney Ohannesian, and at the hour of 3:10 o'clock p. m., a recess is declared for ten minutes. At the hour of 3:25 o'clock p. m., court reconvenes, and at this time witness Alles having been withdrawn temporarily,

Richard Kelly is called and sworn and testifies for the Government on direct examination conducted by Attorney Ohannesian, and is not cross-examined.

John Alles is recalled, and is not required to testify at this time, and having left the stand,

Wm. P. Clements is recalled and testifies further on direct examination conducted by Attorney Ohannesian, and is examined by the Court, and is cross-examined by Attorney Graham; whereupon said witness testifies on redirect examination conducted by Attorney Ohannesian, and is again examined by the Court, and there having been no further cross-examination of said witness at this time,

John Alles, heretofore sworn, resumes the stand and testifies further on direct examination conducted by J. Geo. Ohannesian, Esq., and is not cross-examined, whereupon the following exhibit is offered and admitted in evidence for the Government, to-wit:

Government's Ex. No. 15: Large copper column (part of still, resembling a boiler)

A. G. Barber is called and sworn and testifies for the Government on direct examination conducted by J. Geo. Ohannesian, Esq., and the following exhibits are offered and admitted in evidence for the Government, to-wit:

Government's Ex. No. 16: Two tins of mash
" " " 17: Two " " alcohol

At the hour of 4:33 o'clock p. m., the Court admonishes the jury and declares a recess until the hour of 10 o'clock a. m., tomorrow.

At a stated term, to wit: The February Term, A. D. 1930 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 20th day of March in the year of our Lord one thousand nine hundred and thirty.

Present:

The Honorable John M. Killits, District Judge Pro Tem.

United States of America, Plaintiff,)
)
vs.)
) No. 9926-M Crim.
Nick Bruno, Joe Verda,)
Peter Connley alias George Walker,)
Herman F. Quirin, Defendants.)

This cause coming before the Court for further trial of all four defendants, J. Geo. Ohannesian, Assistant U. S. Attorney, appearing; the defendants being present; Mark L. Herron, Esq., appearing for defendant Bruno; Russell

Graham, Esq. appearing for defendant Verda and Clarence L. Belt, Esq. appearing for defendants Connley and Quirin; Ray Woodhouse being present as official stenographic reporter of the testimony and the proceedings, a statement is made by Attorney Ohannesian re stipulation regarding procuring permit re possession of intoxicating liquor and counsel so stipulate, and it is stipulated that still on Bruno ranch was not registered with the Collector of Internal Revenue.

A. G. Barber, heretofore sworn, resumes the stand and testifies further on direct examination conducted by Mr. Ohannesian, and said attorney suggests that a visit be made to the still and premises. The Court thereupon orders that the jury leave the court room, and the jury having retired, the Court addresses remarks to counsel re proposed viewing of premises; and the Court now having directed that a view of the premises be had. invites defendants to accompany the court and jury and its officers to view said premises. The jury are now called into the court room, and all appearing as before, the Court instructs the jury as to their conduct as they view the premises, and it is ordered that the jury and bailiff in charge have their noonday lunch at the expense of the United States, and that the expenses of the trip be defrayed by the United States Marshal. Witnesses for the Government are instructed to return to court tomorrow at the hour of 10 o'clock a. m., and Mr. Powell, a witness, is excused subject to call, whereupon an informal recess is declared until arrival at the premises to be viewed.

At the hour of 2 o'clock p. m., all being present at the premises in question, certain points of interest are pointed out by defendants' counsel and counsel for the Govern-

ment. Witness Spencer answers questions propounded by the Court, and other witnesses who heretofore testified in this case make statements of facts.

At the hour of 5 o'clock p. m., court adjourns, to meet in the court room at Los Angeles, at the hour of 10 o'clock a. m., March 21st, 1930.

At a stated term, to wit: the February Term, A. D. 1930 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 21st day of March in the year of our Lord one thousand nine hundred and thirty.

Present:

The Honorable John M. Killits, District Judge Pro Tem.

United States of America, Plaintiff,	)
vs.	)
Nick Bruno, Joe Verda,	) No. 9926-M Crim.
Peter Connley alias George Walker,	)
Herman F. Quirin,	)
Defendants.	)

This cause coming before the Court for further trial of all four defendants; J. Geo. Ohannesian and E. E. Doherty, Assistant United States Attorneys, appearing as counsel for the Government; the defendants being all present and their counsel appearing as before; the jury being present and stenographic reporters C. W. McClain, Woodhouse and Hossack being present, all witnesses are instructed to leave the court room until called to testify, and thereupon the following exhibit is offered and admitted in evidence for the Government, to-wit:

U. S. Ex. No. 18, for Ident: Photostatic copy of bill of lading of Thompson Boiler Works, No. 10307 to Kelly Boiler Works 1/8/30

Russell F. Thompson is called and sworn and testifies for the Government under examination conducted by Mr. Ohannesian, and is questioned by the Court, and having been further questioned by Mr. Ohannesian, U. S. Exhibit No. 18, for identification, is offered, received and marked in evidence, whereupon said witness is cross-examined by Mr. Belt, and testifies on redirect examination under questioning conducted by Mr. Ohannesian, and having been further questioned by Mr. Belt, Mr. Thompson is recalled and is questioned by Mr. Herron.

Fred Amsbaw is called and sworn and testifies for the Government; whereupon at the request of Mr. Ohannesian the jury are temporarily excused, and retire from the court room, and said witness being still on the stand, J. Geo. Ohannesian, Esq. presents to the Court statement signed by witness and thereupon a statement is made by the Court; proceedings are objected to, and the objection is overruled; whereupon said paper is handed to the witness, who states that the statements thereon are true; and said witness having been further questioned by the Court and by Mr. Herron, the jury are brought into the court room, and all being present as before, witness Amsbaw, who is still on the witness stand, is questioned by the Court, over the objection of counsel for defendants Bruno and Verda, and is questioned by Mr. Ohannesian; whereupon Statement signed

Fred C. Amsbaw, before O. G. Spencer, Investigator, dated February 7, 1930 is marked in evidence, at the direction of the Court, and is marked "Special Exhibit".

Ed. Funk is called and sworn and testifies for the Government and is cross-examined by Attorney Herron and having thereupon testified on redirect examination conducted by Mr. ———.

H. S. Wagner is called and sworn and testifies for the Government and is not cross-examined.

L. L. Matthews is called and sworn and testifies for the Government and is cross-examined by Mr. Herron.

N. S. Hotchkiss is called and sworn and testifies for the Government, and the following exhibit is offered and admitted in evidence for the Government, to-wit:

U. S. Exhibit No. 19: Bill for lumber to H. F. Quirin 1/21/30, and a recess is declared to the hour of 2 o'clock p. m.

At the hour of 2 o'clock p. m., court reconvenes, and all being present as before, witness Hotchkiss resumes the stand and testifies further on direct examination, and the following exhibit is offered and admitted in evidence to-wit:

U. S. Ex. No. 20: Tag 971 1/8/30
" 796 12/20/29
" 728 12/16/29
" 719 12/14/29
" 67 Oct. 11
" 6959 Oct. 3, 1929
" 6960 Oct. 3, 1929
" 6910 9/30/29
" 6909 Sept. 30, 1929

" 6884 Sept. 22, 1929
" 6868 9/25/29
" 6859 9/25/29
" 6858 9/25/29
" 6857 9/25/29
" 6823 9/23/29
" 6743 9/17/29
" 6625 9/7/29
" 620 12/5/29
" 606 12/4/29
" 577 12/3/29
" 541 11/29/29
" 385 Nov. 13, 1929

and witness is cross-examined by Mr. Graham, and testifies on redirect examination conducted by J. Geo. Ohannesian, Esq., and is cross-examined by Mr. Belt.

Fred R. Ranney is called and sworn and testifies for the Government, and the following exhibit is offered and admitted in evidence in connection with his testimony, to-wit:

U. S. Ex. No. 21: Day Book Pages.....by witness, marked as U. S. Ex. 21

and the following exhibit is offered and marked for identification for the Government, to-wit:

U. S. Ex. No. 22, for Ident: "Tube expander"

Harriet Foster is sworn as interpreter, and thereupon

Perfecto Valera is called and sworn and testifies thru the interpreter aforesaid, and is not cross-examined, whereupon a recess is declared for a few minutes, and

Roland A. Godfrey is called and sworn and testifies for the Government and is cross-examined by Mr. Belt,

and at this time U. S. Exhibit No. 22, heretofore marked for identification, is offered, received and marked in evidence, and said witness is cross-examined by Mr. Herron, whereupon the Court admonishes the jury and declares a recess in this trial until next Tuesday, 10 a. m.

At the request of the Court counsel and defendants remain, and the Court makes a statement, as reflected by the reporter's transcript, and orders that the bonds of defendants Walker or Connley and Quirin be exonerated, and the said two defendants are remanded to custody of the United States Marshal; whereupon bail of defendant Connley is fixed at $15,000 and bail of defendant Quirin is fixed at $10,000. Bond of defendant Connley in the sum of $5000 is exonerated. Upon motion of Attorney Belt, defendant Quirin is allowed to the hour of 11 o'clock a. m., tomorrow to furnish bond, on statement of Mr. Belt that he will be responsible for defendant's appearance.

At a stated term, to wit: The February Term, A. D. 1930 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 25th day of March in the year of our Lord one thousand nine hundred and thirty

Present:

The Honorable John M. Killits, District Judge Pro Tem.

United States of America, Plaintiff,	)	
	)	
vs.	)	
	)	
Nick Bruno,	)	No. 9926-M Crim.
Peter Connley alias George Walker,	)	
Herman F. Quirin,	)	
	)	
Defendants.	)	

Court reconvenes, at the hour of 10 o'clock a. m., for further trial of this cause, counsel for the Government appearing as before; and Samuel W. McNabb, U. S. Attorney, also appearing all defendants and jurors being present, and stenographic reporters Ray Woodhouse, E. L. Hossack and Anderson being present; Mark L. Herron, Esq., appearing as counsel for defendant Bruno; Russell Graham, Esq. appearing as counsel for defendant Verda, and Clarence L. Belt, Esq. appearing as counsel for defendants Connley and Quirin; the Court orders that the Trial be proceeded with, whereupon still found on premises visited by the jury is offered in evidence, and is marked U. S. Exhibit No. 23, for identification, and is received for the purpose of record.

A. G. Barber resumes the stand and no cross-examination having been made of said witness by counsel for defendants Bruno and Verda, he is cross-examined by Clarence L. Belt, Esq., for defendants Connley and Quirin; is questioned by the Court, and is cross-examined by Mr. Graham.

Charlie Hudson is called and sworn and testifies for the Government and is cross-examined by Mr. Herron, and thereupon testifies on redirect examination conducted by Attorney Ohannesian.

Albert Kruse is called and sworn and testifies for the Government, and the jury retire from the court room, by order of the Court.

A statement is now made by Mr. Ohannesian, in the absence of the jury, and said attorney suggests that witness Kelly be brought before the Court, whereupon the jury are again brought into the court room, and all appearing as before, witness Kruse being on the stand, Attorney Ohannesian resumes his questioning of said witness on direct examination; and no cross-examination having been made a this time by counsel for defendant Bruno, said witness is cross-examined by Mr. Belt, counsel for defendant Connley, who moves that certain portion of testimony be stricken, and the motion is denied.

O. G. Spencer, heretofore sworn, resumes the stand and testifies further on direct examination and is cross-examined by Russell Graham, Esq., and at this time the following exhibit is offered and admitted in evidence for the defendants, to-wit:

Defendants' Ex. F: Picture of mine shaft and timbering.

The Court now admonishes the jury and orders that they go to the jury room, and thereupon the jury having left the court room,

Witness Kelly, heretofore sworn, is produced in court and is questioned by the Court, and at this time Mr. Belt having objected to the procedure, the Court continues its questioning of said witness, and an exception is taken by defendant Connley, through Mr. Belt, and the witness is questioned by Mr. Belt.

The jury are brought into court, and witness Kelly is questioned by the Court, over the objection of counsel

At the hour of 11:45 o'clock a. m., the jury are excused to the hour of 2 o'clock p. m., and retire from the court room; whereupon witness Kelly is ordered into the custody of the United States Marshal, and at the hour of 11:47 o'clock a. m., a recess is declared to the hour of 2 o'clock p. m.

At the hour of 2 o'clock p. m., court reconvenes, and all appearing as before, including the jury,

O. G. Spencer, heretofore sworn, resumes the stand and testifies further on direct examination conducted by counsel for the Government, and is cross-examined by Mr. Belt.

Charles Kruse is called and sworn and testifies for the Government and is cross-examined by Mr. Herron; whereupon said witness testifies on redirect examination conducted by Attorney Ohannesian, and is recross-examined by Mr. Graham.

Thomas W. Noe is called and sworn and testifies for the Government and is cross-examined by Mr. Belt, whereupon 146 cases of alcohol are offered in evidence, and mash, on premises, is also offered, and both are received in evidence but are not marked by the Clerk, for the reason that said alcohol and mash are not produced in the court room.

The jury again retire from the court room, and in their absence, Attorney Graham moves the Court for a directed verdict of not guilty as to defendant Verda on the first, second, third, fourth, fifth and sixth counts of the Indictment; and the motion is overruled, with exception noted.

Attorney Herron moves for directed verdict of not guilty as to defendant Bruno on the first, second, third, fourth and fifth counts of the Indictment, and also the

sixth count thereof, and the motion is overruled, with exception noted.

Attorney Belt moves for directed verdict of not guilty as to defendant Connelly, and the motion is overruled, with exception noted, whereupon said attorney makes a like motion for directed verdict of not guilty as to defendant Quirin on counts one to six inclusive, and thereupon said motion having also been overruled with exception noted for the defendant, a statement is made by Attorney Herron, and stipulation is entered into re testimony of one Bryan, or Bryant; whereupon the jury are brought into court, and the said stipulation is stated to the jury. and thereupon

The Plaintiff rests.

Joe Verda is called and sworn and testifies in his own behalf under examination conducted by Attorney Graham, whereupon the jury retire from the court room, and offer of proof is made by Attorney Graham, and the proffer is overruled, and an exception is noted to the Court's ruling. The jury return to the court room, and all being present as before, witness Verda testifies further on direct examination conducted by Attorney Graham, and is cross-examined by Attorney Ohannesian. At the hour of 3:40 o'clock p. m., a recess is declared, and thereafter court reconvenes, and all being present as before,

Nick Bruno is called and sworn and testifies in his own behalf, under questioning conducted by Mark L. Herron, Esq., and is cross-examined by Mr. Ohannesian, and is questioned by the Court, and thereupon said witness having testified on redirect examination conducted by Mr. Herron;

All defendants rest and plaintiff rests.

The jury are now excused to the hour of 10 o'clock a. m., March 26th, 1930; and having left the court room, Mark L. Herron, Esq. moves to strike the last paragraph of the Amsbaw written statement, U. S. Exhibit "I saw Nick Bruno" and thereupon the Court having so ordered, J. Geo. Ohannesian, Esq. moves to strike the entire document.

Attorney Graham moves for a verdict of not guilty as to defendant Verda

Attorney Herron moves for a verdict of not guilty as to defendant Bruno

Attorney Belt moves for a verdict of not guilty as to defendants Connelly and Quirin, and each of the said motions is overruled, as before, and exceptions are noted.

Defendants' Ex. G is now offered and marked for identification, being as follows, to-wit:

Defendants' Ex. G, for Ident: Lease offered while defendant Bruno was on the witness stand and said exhibit having been so marked for the purpose of the record,

W. J. Hanlon appears for witness Kelly, and states that Mr. Kelly will be produced when Mr. Ohannesian desires.

At the hour of 4:45 o'clock p. m., a recess is declared in this trial until the hour of 10 o'clock a. m., tomorrow.

At a stated term, towit: The February Term, A. D. 1930 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the

26th day of March in the year of our Lord one thousand nine hundred and thirty.

Present:

The Honorable John M. Killits, District Judge.

United States of America, Plaintiff,	)	
	)	
vs.	)	
	)	
Nick Bruno,	)	No. 9926-M Crim.
Joe Verda,	)	
Peter Connley alias George Walker,	)	
Herman F. Quirin,	)	
Defendants.	)	

Court reconvenes at the hour of 10:22 o'clock a. m., for further trial of this cause, all defendants being present; Samuel W. McNabb, United States Attorney, and J. Geo. Ohannesian and Emmett E. Doherty, Assistant United States Attorneys, appearing as counsel for the Government; Mark L. Herron, Esq. appearing as counsel for defendant Bruno; Russell Graham, Esq. appearing as counsel for defendant Verda; and Clarence L. Belt, Esq. appearing as counsel for defendants Connley and Quirin; all jurors being present and official stenographic reporter Hossack being present;

At the hour of 10:22 o'clock a. m., J. Geo. Ohannesian, Esq. argues to the jury in support of the Government's case, and thereafter,

At the hour of 10:50 o'clock a. m., Mr. Belt argues to the jury for defendants Connley and Quirin.

A recess is declared, at the hour of 11:22 o'clock a. m., until the hour of 11:30 o'clock a. m., and thereafter, at the hour of 11:36 o'clock a. m., Mr. Graham having argued to the jury for defendant Verda; at the hour of

12 o'clock, Noon, a recess is declared to the hour of 1:30 o'clock p. m.

At the hour of 1:33 o'clock p. m., Attorney Herron argues to the jury, court having reconvened at said hour, and all being present as before.

At the hour of 2:02 o'clock p. m., J. Geo. Ohannesian, Assistant United States Attorney, argues to the jury for the Government, and thereupon, at the hour of 3 o'clock p. m., the Court admonishes the jury and declares a recess.

At the hour of 3:12 o'clock p. m., court reconvenes, and all being present as before, the Court instructs the jury on the law involved in this case, and thereafter Russell Graham, Esq. excepts to the failure of the Court to give requested instruction number one, whereupon the Court gives requested instructions numbers two, three, four and five, and refuses to give requested instruction number six, as repetition; whereupon the Court refuses to give requested instruction number nine, and number ten is withdrawn; and the Court having refused to give requested instruction number eleven; numbers twelve and thirteen are withdrawn, and requested instructions numbers fifteen and sixteen are given to the jury by the Court. Attorney Graham excepts to certain instructions given by the Court on its own motion, and thereupon Attorney Ohannesian having called the Court's attention to a certain case; Attorney Belt excepts to certain instructions given as to defendant Quirin, and the Court enlarges instructions given; whereupon the Court having instructed the jury that when they have agreed upon a verdict, they may deliver the verdict to their foreman, and may then separate, to return to court at the hour of 10 o'clock a. m., tomorrow; the jury,

at the hour of 4:47 o'clock p. m., retire, in charge of Bailiff Wymen, who is sworn to care for the jury during their deliberation upon a verdict. Defendants' requested instructions numbers nine, eleven and fourteen are read into the record, and pursuant to stipulation, are deemed to have been read and excepted to in the presence of the jury.

At the hour of 5:30 o'clock p. m. the jury appear in the court room, and all being present as before, the Foreman asks a question, which is answered by the Court, and the jury again retire.

At the hour of 6:15 o'clock p. m., the Court orders that the United States Marshal provide meal for the jury and accommodations for the night, if necessary.

At a stated term, to wit: The February Term, A. D. 1930, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 27th day of March in the year of our Lord one thousand nine hundred and thirty.

Present:

The Honorable John M. Killits, District Judge.

United States of America, Plaintiff,	)
vs.	)
Nick Bruno,	) No. 9926-M Crim.
Joe Verda,	)
Peter Connley alias George Walker,	)
Herman F. Quirin,	)
Defendants.	)

This cause coming on for further trial, at the hour of 10 a. m., Attorneys J. Geo. Ohannesian and E. E. Doherty

appearing for the Government; Attorney Russell Graham appearing for defendant Verda and Attorney Clarence L. Belt appearing for defendants Connley and Quirin; all defendants on trial and the jury being present, and stenographic reporter Hossack being present; the Foreman of the Jury is now asked if the Jury have agreed upon a verdict herein, and replies that they have agreed, whereupon the verdict is presented, and is read in open court, the said verdict, as presented and read, being as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

United States of America, Plaintiff vs Nick Bruno, Joe Varda, Peter Connley, alias George Walker, and Herman F. Quirin, Defendants. No. 9926-M-Crim.

VERDICT. We, the Jury in the above-entitled cause, find the defendant, Nick Bruno; Not guilty as charged in the 1st count of the Indictment, and

Not guilty as charged in the 2nd count of the Indictment, and

Not guilty as charged in the 3rd count of the Indictment, and

Not guilty as charged in the 4th count of the Indictment, and

Not guilty as charged in the 5th count of the Indictment, and

Not guilty as charged in the 6th count of the Indictment, and the defendant, Joe Verda:

Not guilty as charged in the 1st count of the Indictment, and

Not guilty as charged in the 2nd count of the Indictment, and

Not guilty as charged in the 3rd count of the Indictment, and

Not guilty as charged in the 4th count of the Indictment, and

Not guilty as charged in the 5th count of the Indictment, and

Not guilty as charged in the 6th count of the Indictment, and the defendant, Peter Connley, alias George Walker:

Guilty as charged in the 1st count of the Indictment, and

Guilty as charged in the 2nd count of the Indictment, and

Guilty as charged in the 3rd count of the Indictment, and

Guilty as charged in the 4th count of the Indictment, and

Guilty as charged in the 5th count of the Indictment, and

Guilty as charged in the 6th count of the Indictment, and the defendant Herman F. Quirin:

Guilty as charged in the 1st count of the Indictment, and

Not guilty as charged in the 2nd count of the Indictment, and

Not guilty as charged in the 3rd count of the Indictment, and

Not guilty as charged in the 4th count of the Indictment, and

Not guilty as charged in the 5th count of the Indictment, and

Not guilty as charged in the 6th count of the Indictment.

Los Angeles, California, MARCH 26, 1930.

Young Wilhoite
FOREMAN OF THE JURY

The jury having returned their verdict as aforesaid, the Court comments on certain aspects of the cause, and the defendants who have been acquitted are ordered released, and their bonds are hereby exonerated.

Property seized herein is ordered destroyed, and it is ordered that any part thereof that is salvable shall be turned into money. It is further ordered that dynamite be used to destroy that which it is impracticable to use. J. Geo. Ohannesian, Esq. thereupon suggests that the evidence be not destroyed at this time, but that a watchman be held on the property; and no further order having been made by the Court at this time re property or apparatus, defendants Connley and Quirin are remanded to the custody of the United States Marshal for sentence, to be pronounced at the hour of 10 o'clock a. m., Monday, March 31st, 1930.

At a stated term, to wit: The February Term, A. D. 1930 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 31st day of March in the year of our Lord one thousand nine hundred and thirty.

Present:

The Honorable John M. Killits, District Judge.

United States of America, Plaintiff,)
)
vs.) No. 9926-M Crim.
)
Bruno, et al., Defendants.)

This cause coming before the Court for sentence of defendants Peter *Connelly,* alias George Walker on six counts, and Herman F. Quirin on the first count; P. V. Davis, Asst. U. S. Attorney, appearing for the Government and Clarence L. Belt, Esq. appearing for the defendants, it is ordered that this cause be continued to Wednesday, April 2nd, 1930 for sentence of defendants, as aforesaid, who are now present, at the hour of 10 a. m.

At a stated term, to wit: The February Term, A. D. 1930, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 2nd day of April in the year of our Lord one thousand nine hundred and thirty.

Present:

The Honorable John M. Killits, District Judge Pro Tem.

United States of America, Plaintiff,)
)
vs.) No. 9926-M Crim.
)
Bruno, et al., Defendants.)

This cause coming before the Court for sentence of defendants Peter F. Connley, alias George Walker, on six

counts, and for sentence of Herman F. Quirin on the first count; J. Geo. Ohannesian and Emmett E. Doherty, Assistant United States Attorneys, appearing as counsel for the plaintiff, and Clarence L. Belt, Esq. appearing as counsel for the said defendants, who are both present; Attorneys Mark L. Herron and Russell Graham being also present at this time, and Dudley Hossack being present as official stenographic reporter of the testimony and the proceedings; the said Clarence L. Belt, Esq., now moves for new trial for defendants Connley and Quirin; whereupon a statement is made by the Court and the said motion is overruled and an exception is noted; and thereupon Attorney Belt having made a statement in mitigation of sentence as to the said defendants; statements are made by J. Geo. Ohannesian, Esq., and the Court, whereupon plea for probation is denied; and the Court now pronounces sentence upon defendant Peter Connley, alias George Walker, true name Peter F. Connley, on six counts of the Indictment for the crime of which he stands convicted, namely, violation of Section 37 Federal Penal Code, conspiracy to violate Section 3, Title II of the National Prohibition Act; and Sections 3258, 3281 and 3282 of the United States Revised Statutes, and the National Prohibition Act, as amended, and it is the judgment of the Court that said defendant Peter F. Connley be imprisoned in the United States Penitentiary, at McNeil Island, Washington, for the term and period of one year and two months on the first count; two years on the second count; one year and two months on the third count; one year and one month on the fourth count; and one year and one month on the fifth count, sentences to run consecutively, making a total sentence of six years

and six months; and in addition thereto, pay a fine unto the United States of America in the sum of $4000.00, and court costs taxed at $947.22, and with respect to the sixth count, it appearing that this does not involve imprisonment, but a maximum fine of $500.00, which the imposition of fine of $4000.00, aforesaid covers, it is the further judgment of the Court that said defendant stand committed until said fine of $4000.00, and costs, shall have been paid.

The Court now pronounces sentence upon defendant Herman E. Quirin for the crime of which he stands convicted, on the first count, namely, violation of Section 37 of the Federal Penal Code—conspiracy to violate Section 3, Title II of the National Prohibition Act, and it is the judgment of the Court that said defendant Herman F. Quirin be imprisoned in the United States Penitentiary at McNeil Island, Washington, for the term and period of twenty-one months on the first count, and in addition thereto, pay unto the United States of America, a fine in the sum of $1000.00 and court costs taxed at $947.22 and stand committed until said fine and costs shall have been paid.

It is further ordered that the supersedeas bond, on appeal, of Peter F. Connley be fixed in the sum of $12,000.00, and that the supersedeas bond of defendant Herman F. Quirin be fixed in the sum of $6000; said bonds to be furnished not only for the production of the defendants for imprisonment, in the case of confirmation of the judgment of this court, but also for the payment of fines and costs imposed. Exception is noted on behalf of both defendants.

Upon motion of J. Geo. Ohannesian, Esq., it is ordered that liquor and mash, contents of four cans marked in evidence, and copper column marked in evidence be returned to the Prohibition Department for safe keeping; and on further motion of said defendant, it is by the Court ordered that the day book offered in evidence at the time witness Kelly was a Government witness (referred to as Kelly day book) be impounded for use of the Government, and be turned over to Mr. Spencer, Prohibition Agent.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

HON. JOHN M. KILLITS, JUDGE PRESIDING.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	No. 9926-M.
NICK BRUNO, JOE VERDA, PETER CONNLEY, alias George Walker, and HERMAN QUIRIN,	)	Criminal.
	)	
Defendants.	)	

BILL OF EXCEPTIONS ON BEHALF OF PETER CONNLEY AND HERMAN F. QUIRIN

Be it remembered that at a stated term of court, begun on Monday, the 3rd day of February, 1930, the grand jurors of the United States returned into this court a cer-

tain indictment charging the defendants Peter Connley and Herman F. Quirin and others in six counts,

1. With the crime of conspiracy to violate Title II of the National Prohibition Act;

2. With the offense of manufacturing intoxicating liquor in violation of the National Prohibition Act as amended;

3. With the offense of possessing a still which had not been registered with the Collector of Internal Revenue;

4. With the offense of carrying on a distillery without having given bond;

5. With the offense of fermenting mash on premises other than a bonded distillery; and

6. With the offense of unlawfully possessing intoxicating liquor in violation of the National Prohibition Act.

And said defendants thereafter pleaded not guilty and thereupon issue was joined. And afterwards, to-wit, at a session of said court, held in the City of Los Angeles, California, before the Honorable John M. Killits, Judge of said court, on the 18th day of March, 1930, the aforesaid issues between the parties came on to be tried before a jury of said court for that purpose duly empaneled.

Exception No. 1

At this stage came as well the government and said defendants with their respective attorneys, to-wit, Messrs. J. George Ohannesian and Emmett E. Doherty, Assistant United States Attorneys, representing the plaintiff, and Mark L. Herron, representing the defendant Nick Bruno, Russell Graham representing the defendant Joe Verda, and C. L. Belt representing the defendants Peter Connley and Herman F. Quirin. And the attorneys for the said

(Testimony of O. G. Spencer.)

defendants moved the court to require the plaintiff to elect whether it would proceed on the second count of the said indictment or on the fifth count of the said indictment, and to require the said plaintiff to proceed on one only of said counts, on the ground that the offense named in the fifth count of the indictment was necessarily included in the offense named in the second count of said indictment. This motion was by the court denied and the defendants excepted.

After the indictment was read and the plea of not guilty stated, the following proceedings were had:

It was stipulated by and between counsel for all the parties to the action, which stipulation was approved by the court, that any objection made by counsel for any defendant or any exception taken might be understood to apply for the benefit of all defendants to the action.

PLAINTIFF'S EVIDENCE.

O. G. SPENCER,

a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. OHANNESIAN,

THE WITNESS: My name is O. G. Spencer. I am an investigator for the United States Government and have been in the government service in that capacity about four years, having had no other positions with the government. I am located in Los Angeles in this Division, as an investigator under the jurisdiction of Mr. Woods of the prohibition department. I know and have been on the land described as the west five acres of lot 2, the whole of lot 3, and the east five acres of lot 4 of the Sunny Slope Divi-

(Testimony of O. G. Spencer.)

sion of Section 28, Township 5 south, Range 4 West, County of Riverside, State of California. That is about five miles northeast of the Town of Elsinore. I was there the first time on January 22nd or 23, 1930. I measured the ground and made a pencil sketch.

(Whereupon it was stipulated that the pencil sketch mentioned might be introduced in evidence; and it was introduced as Government's Exhibit No. 1.)

THE WITNESS: I might state that during the last trip that I was over there I got the city engineer of Elsinore with his transit to lay off the lands and directions. We located the corners and measured from the section corners.

(Whereupon an enlarged blackboard drawing of said pencil sketch was exhibited to the jury and referred to from time to time.)

THE WITNESS: I made the blackboard drawing from the pencil sketch. The blackboard drawing is exactly like the pencil sketch except that it is on a larger scale. This from here up represents Section 21, most of which is recorded in the books as the property of Quirin and others. That is the way it is listed on the books, with the exception of this corner cut up here, which is the northwest corner. That is not included in this. The balance of this quarter section is. This is the northeast quarter section of Section 21, Township 5 east, Range 4 west; and from here down the Sunny Slope Division, the top part of that subdivision, is divided into four lots supposed to be approximately 20 acres each, 1, 2, 3 and 4. Bruno's ranch includes all of No. 3, the west five acres of No. 2 and the east five acres of No. 4. No. 3 includes a fraction

(Testimony of O. G. Spencer.)

less than 20 acres. There is about 30 acres in the entire lot that is included between the dotted lines. This is in Section 28, the same township and range as the one above, in the northeast quarter section of Section 28.

This is the main paved highway from Elsinore to the town of Perris. It is referred to as the Perris-Elsinore Highway and it is paved all the way through. It is probably 20 feet wide and is marked "A" on the map. This building here is the home of Herman Quirin, one of the defendants, and is indicated by the letter "B" on the map. There is a dirt road that leads off of the highway here practically straight north of Herman Quirin's home. The road here runs within 30 feet of the house This dirt road leads off. It is not a graded road. It is just level ground there where they have been driving. It passes right in front of his house and straight south across his property into this ranch of Bruno's, through a gate right here. The road is indicated on the map by "C" and the gate by "D". The distance from the Elsinore-Perris Highway to the Quirin house is indicated on the map as being 30 feet. This is the first fence. There is no fence from the road down until you come to this fence around Bruno's property. There is a gate through that. The road runs straight on to the house and passes the house and goes between where the still was and the shed here that was stacked up with distillate in drums. The house is indicated on the map by "E".

(It was stipulated at this point that the property referred to as the Bruno property was the property of the defendant Nick Bruno.)

THE WITNESS: This road runs on past there to another gate here, where you get out of the fence. That

(Testimony of O. G. Spencer.)

is the limit of the extent of the fence. Right here opposite the shed the road extends down the hill. The other gate is indicated on the map by "F". The other gate is directly south of the house that is marked "E." The road extends right straight on through there between the house and the shed here. It is a private road all the way across this property of Bruno's. The still was located in a pit, 40x50 feet, 200 feet southeast of the corner of the house, and is indicated by the letter "G." There was a shed directly west of the still upon the hill, in which there were sixty 50-gallon steel distillate drums, about half of them full of distillate. This shed is indicated on the map by the letter "H." It is 200 feet in a direct line from the corner of the house marked "E" to the location of the still marked "G;" and the house is on a hill. The ground where the still is is about 18 to 20 feet lower than the ground on which the house is situated. Directly in front of the shed which is marked "H" on the map there was a steel drum buried in the ground, which was almost covered up, just the top of it showing, just across the road from the shed, about 20 feet from the shed, indicated on the map by the letter "I." There was no gage on the top of the tank although there was some fuel oil in the tank. I measured it with a stick and it was approximately half full. There was a pipeline run directly from that tank down to the still pit to the burners, the pipeline being marked on the map "J." The circle on the map represents the dump there of an old mine. This is the direction that the mine took from the dump. It was an incline shaft, about maybe 60° from the horizontal; not a straight shaft.

(Testimony of O. G. Spencer.)

I did not go into that pit but observed about 60 feet from the entrance of the hole that there was a platform built down in the mine; and there was a gasoline engine-driven power pump down in there. The exhaust ran up the shaft to the top and there was a Ford muffler on top of the exhaust; and connected directly to that water pump was a 2-inch iron pipe. The pipe came out of the dump and down over the end of it; and at the time I was there that was the end of the pipe coming from the mine. But right here was another pipe extending from there to a concrete tank, that is, from the road "C-C" down to the other tank. There was a 2-inch pipe all the way. This pipe here had been disconnected recently and it had been pulled around away from the end here because the weeds and the grass were all still pulled over. With the assistance of Chief Barber of Elsinore we pushed the pipe back and it certainly fitted the end of this pipe. The other end of the pipe emptied into a 20x20 cement pit right back of the Bruno house, which house is marked "E." When I say "pit" I mean a cement reservoir nearly on top of the ground, 3 feet deep and 20 feet square. When I got there there were about six inches of water in the reservoir. There was 2-inch pipe from the bottom of that reservoir came out and directly to a small tank in this still pit. I looked around to see if there was any other pipe or source of water for the still and I couldn't find any pipe or anything to supply water from any source except this one.

Referring to a mark on the map, apparently an extension of the road marked "A," there is a small range of hills or mountains right in here; and just south of it it flattens out again and there has been quite a lot of driving through

(Testimony of O. G. Spencer.)

here in all directions. There is no graded road through. That is west and south of this property. And right here, a little bit southeast of the Bruno house, there is an old shed or house on the hill off the Bruno property; and there has been some travel around this old place but there is no graded road and very little travel. There is no one living there at present but I saw one or two cars drive up there and park for a while and drive away while we were here at this place. An examination of that road showed there had been a little travel down in here. It looked like there might be one or two automobiles driving in there recently and to this place where I saw one or two cars The road indicated that it had been very light traffic over that road.

(Whereupon two photographs, which were produced by counsel for the defendants, were introduced by stipulation as Government's Exhibit No. 2. And the road marked "A" on the map was pointed out by the witness on this photograph, as was also the house marked "B", the road marked "C", the road extending straight south to the Bruno house, and the gate marked "D".)

THE WITNESS: The photograph shows a rock dump of the mine. The pump and engine were down in the mine right on the incline back of that dump. This dump is marked "K" on the blackboard.

(Whereupon a photograph, produced by counsel for the defendants, was, by stipulation, introduced and marked Government's Exhibit No. 3.)

THE WITNESS: Referring to this photograph, it is not a very good picture. It is not all taken at one time, that is, there are several pictures pasted together. I have got it picked out now, I guess. This is the shed, marked

(Testimony of O. G. Spencer.)

"H," up there that the distillate was found in. The distillate tank is in the ground just across the little streak here. I don't know whether it shows in the picture or not. It was almost entirely covered up. It doesn't show in that picture. You can't see the tank but it is right straight across from this shed; and the pipeline ran down the hill and entered the ground right about here. This is the edge of the still pit. This pile of hay here was stacked up around parts of the still column that stuck above the ground level; and under this pile of hay were two copper still columns about 28 or 30 feet distant from the top of the stack to the bottom of the pit in this corner where the stills were; and then the still pit was not as deep all over as it was right under the haystack. The pit was 50 feet by 40 feet and about 12 feet deep right under the sod. This is the Bruno house right up here. The cement water tank is behind this house. The pipe runs down past these trees and on under the ground. This is a little shed just down on the hill, used for nothing in particular. There is a little footpath runs from the house right down there, with a gate there, and there is a wire fence around this part of the ranch, in addition to the ranch being entirely surrounded by another fence. "D" is the gate, and there is an extension of the road "C" leading through the ranch which you have described and going to a gate to the back of the ranch. This road leads to the south gate of the ranch.

(Whereupon a photograph, Government's Exhibit No. 4, was, by stipulation, admitted in evidence.)

THE WITNESS: I was present and assisted in taking a full set of pictures. This picture was taken looking

(Testimony of O. G. Spencer.)

west from across the slough on the hill, covering the still pit and the house.

(Whereupon Government's Exhibit No. 5 was, by stipulation, admitted in evidence.)

THE WITNESS: This picture is a correct representation of a stack of hay where the still was located. The picture was taken from right near the small shed where the distillate was stored, showing the hay and the stack of sugar.

(Whereupon Government's Exhibit No. 6 was received in evidence.)

THE WITNESS: This picture was taken from almost the same place, looking east. The camera was pointed almost directly east; and it shows the hay stacked around the still and a pile of sugar. It differs from Government's Exhibit No. 5 in that the top of the roof over the hay had been loosened and raised a little bit, showing the top of a wooden frame that had been built up inside of the baled hay. Government's Exhibit No. 6 was taken from the same place as Government's Exhibit No. 5, without moving the camera. It shows a little more of the hay moved away and the top was opened up a little more, exposing a little more of the framework inside of the hay.

(Whereupon Government's Exhibit No. 7 was received in evidence.)

THE WITNESS: This picture was taken at the same time as the last one. The camera was moved a little closer. It shows a little more of the hay removed and some of the parts removed and exposing the top of the

(Testimony of O. G. Spencer.)
water tank on the one hand and the top of the still tank on the other.

(Whereupon Government's Exhibit No. 8 was received in evidence.)

THE WITNESS: This picture was taken at the same time as the preceding exhibit but taken from the south. The camera was pointed north. It shows a smoke-stack for a boiler from the pit, the end of the pile of sugar, the baled hay that was stacked around the top of the still, and it shows the shed up here where the distillate was stored and the Bruno house and trees. I had the official photographer with me, these being government's pictures.

(Whereupon Government's Exhibit No. 9 was received in evidence.)

THE WITNESS: This was taken at the same time as the others and it is down in the pit. It is a flashlight picture, showing a part of the mash vats and also an electric bell that was tacked up on a post right next to the entrance to the pit.

(Whereupon Government's Exhibit No. 10 was received in evidence.)

THE WITNESS: This is another flashlight picture, taken from down in the ground from almost the same position. It shows a few of the tanks and the ladder from the pit to the entrance over here and also the electric bell.

(Whereupon Government's Exhibit No. 11 was received in evidence.)

THE WITNESS: This picture was taken on the same date and shows the boiler in that pit and the edge of one of the tanks. It was not directly under the hay but it was

(Testimony of O. G. Spencer.)

in the pit that was under the hay. You see, the pit extended quite a ways out all around the hay.

(Whereupon Government's Exhibit No. 12 was received in evidence.)

THE WITNESS: This picture was taken before this last bunch a day or two. It shows the copper still columns, part of them, and a stack of empty 5-gallon alcohol cans. There was a mirror hanging on the east edge of the still pit. If a man would stand with his back to the entrance to the still pit and look into this mirror, he could see anyone coming down the ladder into the pit. Government's Exhibit No. 12 was taken down in the pit, a flashlight picture directly under the pile of hay, and shows part of the still, on the top of which those columns are bolted that we have seen in another picture, and a pump that pumps the overflow or surplus water out of the pit. That was a steam-driven pump.

(Whereupon Government's Exhibit No. 13 was received in evidence.)

THE WITNESS: That picture shows the steam gages and so forth, or pressure gages, in other words, in a looking glass, and a part of the piping in the pit right directly in connection with the still and under the hay that was there.

(Whereupon the witness was temporarily excused. not having finished his direct examination. On March 25, 1930, the witness was recalled for further direct examination and testified as follows:)

THE WITNESS: I have gone out to the Bruno Ranch about five times altogether. The last time was yesterday and I was out there last Saturday. The first

(Testimony of O. G. Spencer.)

time I was there I arrived about 11 o'clock in the morning of January 24, 1930, three days after the raid. I went alone as far as Elsinore, where I picked up Chief of Police Barber, who went with me. I made an investigation of everything that I could find or see from the highway by Mr. Quirin's home, through the Bruno Ranch and around the still and around the house and all the sheds and everything that I could find that had any bearing on the case. I know where the mine pit is located. On the first day I was there I examined the pipeline and the water system from the pumps down in the mine all the way to the Bruno house and to the still. There was no other pipe connection or no other source of water supply to the still itself that I could find other than this pipeline, except there was a portable system. They could have hauled water in a wagon or something; but there was no regular pipeline system. That was the only permanent means of water supply. From the mine the pipeline runs in an almost direct course to Mr. Bruno's ranch and right straight south from the north fence on his ranch to a concerete pit right back of the house. It ran over farming ground across Mr. Bruno's place, about the same type of ground north of Bruno's place, and across Quirin's place. Grain had been planted on the land through which this pipeline passed but it had not sprouted yet. Yesterday was the last time I went out there and observed that there was grain growing. There were either four or five places that the pipe cropped out of the ground from the mine to the concrete pit. Three of those were inside of the fence in the field of grain—cropped out in three places in the field. The pipeline ran from about 8 inches below the ground to

(Testimony of O. G. Spencer.)

the surface of the ground, and in some places it stuck above the surface just a little bit. There was a pipeline running from the fuel tank buried in the ground directly in front of the shed near the Bruno house direct to the still pit and the pit of the boiler. It ran through the planted field. The pipe showed up for 15 or 20 feet between the tank and the still up near the fuel tank. After it left the gasoline tank or reservoir it went to the burner under the boiler in the still pit. I followed the pipe all the way except right for a little distance. On the roof of the still pit it was covered up in the dirt before it came through the wood. I saw where it was connected at the far end to the fuel tank. The buried tank was a little over half full of fuel.

In the shed that was on the hill near the Bruno house I examined the oil drums and found 60 altogether. All of them had marked on one end, "No. 2, Dist." I don't know what that "Dist." stands for. That was stencilled on the end. There was one similar drum, painted the same color, with the same marking on the end, at the Quirin home near the road when I arrived there; and it was there for one or two weeks after my first trip there. The Quirin home was right adjoining the Elsinore-Perris Highway near the mine. I went down into the still pit and made an investigation there, finding some large wooden fermenting vats and some galvanized tanks. Six of these vats were practically full to six inches of the top with mash, most of it fermenting. I figured the capacity of those vats to be between 8,000 and 9,000 gallons each. This mash was fermenting and boiling pretty lively. I poisoned it to stop that. At that time I noticed there were galvanized iron

(Testimony of O. G. Spencer.)

tanks in the pit. Two of them were connected up and the other was disconnected. The two that were connected up were practically empty; but there was very little liquor in the bottom, dripping out of the spigot, when I opened it. I went out there yesterday primarily to take Mr. Kruse to see if he could identify that boiler base; and I made a very casual investigation as to the lumber or timber that was used in the Quirin house, as I had examined that very thoroughly before. I made an investigation of the lumber that was used in the mine pit and, likewise, the timber or lumber that was used in the still pit. I was in court when the government offered in evidence tags as to items of lumber sold to Quirin.

In the still pit there were 4x4s, 2x4s and 2x12s. There were two or three 8x8s and several 6x6s. I did not find any like dimensions in the house known as the Quirin house. I did find in the mine pit some 2x2s and some 2x4s. I did not find any 4x4s in the mine pit. They were in the still pit next to the boiler on the east side of the pit. When I took Mr. Kruse there yesterday I examined the boiler base right at the still. The boiler base was lying within about 20 feet of a pile of hay over the still. That was the dismantled boiler outside. Mr. Kruse looked at it. He knew nothing about the base of the new boiler, that is, the new boiler outside. I recall that there were what appeared to be new tubings at the still of 2-inch diameter, 6 feet long. There were four new tubes and three old tubes in the pile.

CROSS EXAMINATION

BY MR. GRAHAM:

THE WITNESS: I didn't see any 4x4 timbers in the mine pit.

(Testimony of O. G. Spencer.)

(Whereupon Defendants' Exhibit F was received in evidence, which was a photograph of the mine pit or shaft near the Quirin house.)

THE WITNESS: I recognize that to be a photograph of the mine shaft. I don't know whether the timbers that form the timbering of the hole itself are 4x4 timbers. I didn't notice any 4x4 timbers and there is no way on earth to tell the dimensions of anything by a photograph. I was down in the mine shaft all the way to the pump. I did not examine or measure the timbers shown in the photograph supporting the top of the hole. I looked at them to see if it looked safe enough to go down. I went down to the pump, which was about 60 feet below the top of the hole, but didn't look at those timbers very closely. I think they were square but I wouldn't like to be too definite on that. They were not round timbers; I am sure of that. They might have been 3x4s or 4x5s or something like that; but they were approximately square. They might have been 4x4s. I didn't examine those very closely. The main idea in going down into that shaft was to get the number off the pump and the engine. I was not down there yesterday. I said I made an examination of some of the lumber yesterday but I made a thorough examination before yesterday. My main business in the mine was to examine the pump and the engine. The reason that I happened to take the dimensions of part of the lumber and not of the rest was that was right before my eyes as I went down. I walked right past there to get down the hole. There was timber under water in the bottom of the shaft. I stopped at the pump and it was about three feet from the water. I saw some timber below the water also. That also went down under the water. One had the side into the water.

(Testimony of O. G. Spencer.)

O. G. SPENCER,

recalled, and testified as follows:

DIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: When I went down to the still pit I made an investigation as to the kind of light or lamp that was used in the pit. They were a gasoline hand lantern that uses a mantle, with an air pump attached to the base of the lamp, to pump up the pressure on top of the gas or fuel, a self gas generating light.

My attention being called to Government's Exhibit No. 22, I have seen it before. I got that out of a box nailed on the wall right near the boiler, in a steel pit.

Referring to Government's Exhibit No. 22, I brought it in, and it has been in my possession until this trial started, and it was brought to the courtroom by Mr. Clements, and I had possession, except while he was bringing it in from my car.

CROSS EXAMINATION

BY MR. BELT.

THE WITNESS: Directing my attention to the gasoline lamps, each lamp had two mantles. The mantles were not intact. Some of them were broken, but some of them still had the mantles attached. I saw three of the lamps, and I guess there were about half of the mantles broken. I would not say that there was one good mantle on each lamp. There was one lamp that I don't think had any mantle at all. I did not light the lamps, so I do not know whether they were in a working condition, as I did not try them.

(Testimony of William P. Clements.)

WILLIAM P. CLEMENTS,

a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: I am a federal prohibition agent. Have held that position for two years, being in that position in January and February of this year. I have seen the defendant Verda before; also the defendant Bruno. First saw one of them on a ranch about five miles east of Elsinore, known as the Bruno Ranch in that district, that being the premises testified to by Officer Spencer. The first time I was in Elsinore was along about the 15th of January of this year, and I was in the company of three other agents then. Their names were Agents Short, Schermerhorn and Alles. On this first occasion I did not see any of the defendants. The next time I went there was January 21st. Agent Alles was with me. It was between 1 and 2 p. m. in the afternoon when I arrived at the Bruno Ranch. I first saw the defendant Joe Verda. He came out of the house on the ranch marked "E" on the map and walked down to the road with a red handkerchief in his hand. We were driving in an automobile and he came out of the door on the side of the house. We were probably two or three hundred feet away between this gate and the house. He walked on down the road we were coming in and he walked almost directly in front of the car and waved the handkerchief like this (indicating) to stop the car; and we didn't stop. We pulled on around him and drove clear around the side of the house and in back of the house marked "E." The defendant turned around and came back up to the house. I did not see the

(Testimony of William P. Clements.)

defendant Bruno at that time. At that time Verda didn't say anything. He came up to the house and the defendant Pete Connley, or George Walker—he gave his name as George Walker, the heavy set gentleman there at the corner of the table by Mr. Doherty, the assistant United States attorney—came out of the other door of the house. There are two doors, one on the south side and one on the north side of the house. The house is set east and west. He came out of the other door where we had driven almost directly behind the house. When we stopped he came out and he, Walker, otherwise Pete Connley, spoke to me and I told Mr. Walker who I was. He said, "Good afternoon," I believe it was. We passed the time of day. I don't remember the words he used. And I immediately told him who I was. I told him I was a federal prohibition agent and had information that there was a still on this ranch and that I would like to look around. At this time Agent Alles and the defendant Verda were standing close to the house, probably 5 or 6 feet away. Mr. Connley said he didn't know of any still around there and that we were perfectly welcome to look around, and to come on in the house. I told Connley there was nothing in the house I wanted to see; that, if the still I had heard was around there, it wouldn't be in the house. He said, "Come on in, anyway." And we went in the house, walked through the house, and in a small room we found a boiler for a still, I should judge a 150-gallon copper boiler. It was not in use. This was a boiler around 5 feet high and about 30 inches across, I should judge, with a connection in the top. There was nothing connected to the top. There were no coils. There was a connection for the fitting.

(Testimony of William P. Clements.)

It wouldn't be a pipe fitting but it was a joint. It had a cover like this and a round hole in the top of it; and, if I remember right, there was a connection for a bolt joint fitting. I had seen something like it before, having been in the prohibition business two years. I have seized between 40 and 50 illicit stills and I would say it was a boiler for a still. It had been used but not recently, the fact that it was smoked on the bottom indicating that it was used. There was no mash or anything on the inside. It had been washed out clean. Agent Alles, the defendant Peter Connley and myself turned around and came out of the house and walked over to a shed possibly 50 feet from the house. Verda stayed close to the house. He didn't stay in the house. He came out and stayed around close to the outside of the house. We walked out to this distillate shed (marked "H"); and it was practically full of 50-gallon distillate barrels and hay. There must have been 80 or 90 distillate barrels. I walked over to one of these and shook it and it was full of distillate. It was a 50-gallon iron barrel, the regular iron barrels they use for oil. At the same time I saw this buried tank in front of the shed, (marked "I"). I saw the top of this tank; and I walked back over to the defendant Connley and said, "Well, where is it at"? He said, "I don't know that there is anything around here." So Agent Alles and the defendant Connley and Verda, he having come out where we were about that time, and there being a very well defined road down this hill between the shed and the house, the road that ran down to the still—I said, "Let's walk down this road and see what there is here." So Agent Alles, the defendant Connley and the defendant Verda and I

(Testimony of William P. Clements.)

started down the road. Verda stopped about half way down to the still and Connley and Agent Alles and myself proceeded on down to the still location. We got to the top of the hole. And I asked the defendant Connley what was down in this hole. He didn't answer but he started on down the ladder of the hole; and he stopped at the top after he had taken a couple of steps on the ladder, his head being still above the hole, and said, "There is no use of you fellows coming down in here. We can fix this up all right. I know the owner of the still and we can all make some money on it." So I told the defendant Connley we would go on down; that money wasn't what I was there for. And we went down to the still. And there was about seven or eight thousand gallons of mash. It was about 8x12, 8 foot high and 12 foot across, approximately a thousand-gallon still, and some alcohol. I didn't know how much at that time. It later turned out there was one hundred and fifty 5-gallon cans. There were 25 5-gallon cans sitting on the floor, 625 gallons and a cooling tank. After we came back up out of there I immediately arrested the defendant Walker, or Connley. He gave the name of Walker. George Walker was the name I knew him by. Agent Alles and the defendant Walker and I came back up to where Verda was standing; and we arrested him, too, at that time and walked on back up to the house. When we went down to the still, that is, Agent Alles, Walker, Verda and I, there was a truck sitting back of the Bruno Ranch marked "E." As we started down there there were two or three gentlemen in the field down below the house at the time working on something, either a pipeline or on some lumber that was there. One

(Testimony of William P. Clements.)

of these gentlemen came up and got on this truck when we were about half-way down to the still. He started the truck up and drove it off. As soon as Alles, Walker, Verda and I came back to the house I asked Walker what his connections were there and he said he was building a water tank. There was some lumber there which he was working on. He said that he was a contractor. I asked Verda what his connections were there and he said he was hired to take care of the ranch, the mules and the house; was getting $30 a month for doing it; that a man by the name of Frank Ramiro hired him; that he had been there about four days. The defendant Connley stated that he had been there about ten days. The defendant Connley didn't ask me how much money I was making a month at that time. He asked me if there wasn't some way that he could fix this up; that there wasn't any use of anybody going to jail over a place like this; that there was too much money invested; that it would be easy for all of us to make money. I did not observe the defendant Verda do anything while I was there except when we came up there he tried to stop us by waving his handkerchief at us and getting out in the road in front of us. That is the only thing he did while I was there. I left as soon as I had this conversation with the defendant Connley and the defendant Verda and followed this truck. I had the license number of the truck, having taken it when I went up there. I followed it over to the house on the highway that was occupied by the defendant Herman Quirin, the house marked "B". This truck drove up in the rear of that house and stopped, being stopped when I was there. I

(Testimony of William P. Clements.)

didn't see it come in but I followed it over there; and it was setting there when I got there. I stopped and went over to the truck. There was nobody around the place and I walked on in the house and there was nobody in the house. The house was furnished. At that time I didn't know whether this house was on the same ranch with the still or whether it was two different ranches. And I came out and went to Elsinore and called the prohibition department for help and at the same time met Chief of Police Barber. I had taken the rotary off this truck, off of the distributor of this truck, so that they couldn't move it. I was probably gone forty minutes. Chief of Police Barber and I came back from Elsinore to this house. And the truck was gone and the defendant Herman Quirin was there shaving when we walked into the house, into Quirin's own home, the house on the highway marked "B." There was nobody there but him. When I walked in he said, "What do you mean by coming in here"? I said, "I have come over after you." The defendant Quirin said, "What are you going to do? Take me over and set me on the spot"? So I told him I wasn't setting anybody on the spot; that, if he was guilty, I wanted him, and if he wasn't guilty I didn't want him. So I asked him what became of the truck. He said, "Well, the man that owned the truck took the truck away." I said, "Do you know the man that owned the truck"? He said, "I saw him a few times." I said, "Well, who was he"? He said, "Well, I don't know him by name but I know him when I see him." We waited until Mr. Quirin got through shaving, he being about a half or a third through, having just got his face lathered and had taken just about one

(Testimony of William P. Clements.)

scrape with the razor. We took him over to the still with us. All of the defendants made the statement that this ranch was the Bruno Ranch and that Nick Bruno owned it. I told Chief of Police Barber, if he knew where Nick Bruno was, to take my car and go get him. He didn't have any car. It was a government car we were using. So he took that car and proceeded back to Elsinore and in an hour or a little more the constable came. I do not know his name. He came back with Nick Bruno and some goats on a truck. So Agent Alles went with Bruno to take the goats wherever he, Bruno, was going; and then Bruno and Agent Alles came back. After we came back from Elsinore we stopped at Quirin's home, marked "B," and picked him up and came over to the Bruno Ranch, Bruno being the last man to come there, he coming there when he was brought there by the constable. At the time I went into the house marked "E," the Bruno house, I was invited in the house by the defendant Connley. And at that time I did not see an electric bell on the wall, but the first time I was in the still I saw a bell in the still on a post. I had never found the push button yet the first time I was in the house. Later that afternoon this bell and other apparatus was traced out by Chief of Police Barber and Mr. Piles of a newspaper out there; and they traced it back to the house and showed it to me. It was in the room next to the dining room. The bell was on the side of a 2x4 if I remember, on a joist that ran up; and they had nailed a board over this to cover up the button and you had to reach around this board to get around to push the button. I did not operate it to see whether it worked

(Testimony of William P. Clements.)

or not. I don't remember any of the defendants making any statements to me.

They were taken in two carloads to the Elsinore jail, there being Assistant Administrator Peters and Investigator Noe and Agent Alles and Investigator Rhodes, Chief of Police Barber and the constable. We left them at the Elsinore jail; and I did not at any time after that date have any conversation with the defendants.

I did not go back to the plant again until two or three days ago, when, being down there on some other business, I stopped in to see the place. But that is the only time. Well, I was there the next morning. I left there the night of the 22nd, when I was relieved. I came back from Elsinore to the plant and stayed there until the next evening, when I was relieved. I traced a pipeline out but I didn't go clear to the end of the pipeline. It ran across toward the Quirin Ranch from the still. It ran in that direction but I didn't follow it out and did not follow it as far as the road "E" between the two houses. The pipeline that I followed didn't go towards the road "E." It went out toward a water tank that was behind the Bruno house. The fuel line ran up the hill, right straight up to the road "E" there. I followed it. The fuel tank was right on top of the hill. It was up a little rise there at the edge of the road marked "E."

CROSS EXAMINATION

BY MR. GRAHAM:

THE WITNESS: I could see the house on the Bruno Ranch from the main highway; I wouldn't say just exactly from what point. It is not straight out this road marked "E." You can't see the house from a place on

(Testimony of William P. Clements.)

the highway near Quirin's Ranch, that is, if you can, I didn't see it; but you can see the house farther up the highway towards Perris. The road that runs past Quirin's house into the Bruno Ranch is not a straight road. There is a little curve around the hill; and then it goes right straight in. I don't believe you can see Quirin's house from the Bruno Ranch. I saw some different roads running in off the highway in the direction of the Bruno Ranch other than the one past Quirin's house; and I have gone over some of those other roads. I don't think there are several roads to get into the Bruno Ranch other than the road past Quirin's house, but there is one other that I know of. If there are others around there, I didn't see any. Referring to the one I know of, it hit the main highway I would say possibly half a mile toward Elsinore around a little hill there. Where the road curves around in here it would be clear around the hill from Quirin's house, as Quirin's house sits right down under a hill. If you were coming from the other way, you would miss the house. I have missed it several times. I noticed these curves in the highway marked "B," and I don't think the curve has got as great a curve as is shown on the map. But it curves around in here. I wouldn't say just how much it curves. I know there is a curve in that road but I do not know that it comes close to the Bruno ranch.

(Whereupon the witness was shown a panorama photograph, which was thereafter received in evidence and marked Defendants' Exhibit "A.")

THE WITNESS: I recognize that picture and I recognize the Bruno Ranch. I don't hardly believe the road comes as close to the ranch myself as is shown by

(Testimony of William P. Clements.)

the curve marked "A" on the blackboard. There is, however, a bend that goes right around that house. I wouldn't say how much it is because I never paid any attention. According to my recollection, this photograph correctly shows the lay of the land.

(Whereupon Defendants' Exhibit "B" was received in evidence.)

THE WITNESS: I recognize that photograph as a photograph of the back gate concerning which I have testified. I mark with an X a road which I think goes to the boulevard; but I am not certain about it. It looks like the road that goes down to the boulevard but I couldn't say for sure whether it is or not.

(Whereupon Defendants' Exhibit "C" was received in evidence.)

THE WITNESS: I recognize this photograph as a photograph showing the cement reservoir which was by the house on the Bruno Ranch, the photograph looking toward the front gate, with a small hand pump by the side of the reservoir. The goat sheds are off in the corner of the ranch. The land was under cultivation on the 21st day of January when I was there. I wouldn't say it had been plowed but a drill had been run over it and grain, it might have been barley or oats, seeded. It was just starting to sprout. If it had been plowed, it wasn't recently plowed. The ground wasn't soft.

(It was stipulated by Mr. Graham, in answer to questions of the Assistant United States Attorney, that the photograph which has been introduced as Defendants' Exhibit "B" shows that this is the back gate; this is the shed under which the distillate tanks were found and this

(Testimony of William P. Clements.)

is the house. The reservoir is on the other side of the house. The gate is farther up this way. This is the haystack that had the still under it.)

(Whereupon Defendants' Exhibit "D" was received in evidence.)

THE WITNESS: This is a picture looking in the opposite way from the last one introduced, looking right at the front gate and on towards the house on the Bruno Ranch. This land just across the fence in the picture is the land on which the grain had been planted, this fence marking the boundary line of the Bruno Ranch. These signs were not on the gate at the time we went there. We put the red "Stop" sign on while we were there. The box at the left of the gate wasn't there either, as I remember.

(Whereupon Defendants' Exhibit "E" was received in evidence.)

THE WITNESS: I don't remember those telephone poles shown along there in the photograph; but this is the back gate of the place and there was a road came along this corner. I recognize the house and the galvanized iron shed. There are two roads which come from the boulevard which runs between Perris and Elsinore, which leads to the back gate shown in this picture. One of these roads, the road that comes past there, that is marked "A," goes up around the corner there where the goat sheds are. It is a very light road and goes over there and meets the road from the back gate; and that road from the back gate continues up to one house that is a half or three-quarters of a mile away up on the hill. The goat shed is right on the northwest corner of the Bruno Ranch. I will mark it "L." By the dotted line on the map is indicated

(Testimony of William P. Clements.)

the lines on the Bruno Ranch; but the way it is indicated on the map there is five acres on each side. The goat shed was in the corner of the ranch at the fence line there. If the fence line is the edge of the ranch, it is in the corner. At the time I went there and made the arrest there were no goats in the goat sheds that I saw.

CROSS EXAMINATION

BY MR. BELT.

THE WITNESS: I first saw the defendant Connley when he was coming out of the house on the Bruno Ranch on January 21st between 1 and 2 p. m. I was getting out of the car not directly on the corner but a little past the corner of the house at the rear at that time. I was about 10 feet away from the door that he came out of. He had one hand on the screen door, or the door of the house, and was headed out, but was all the way out of the building when I saw him, only he still had hold of the door. He passed the time of day. I believe he said, "Good afternoon;" but I wouldn't be sure of the words; just a greeting. I was with Agent Alles. We were within hearing distance of each other. Verda was coming around the end of the house or coming out of the house, if I remember right. That was about 20 or 30 feet distant from where I and the other officer were standing. I told the defendant Connley that I was a federal officer and had information that there was a still on this place and would like to look around. He said, "I don't own this place." I told him I was going to take a look around the place anyhow. He said, "Well, come on in and look at the house." I said, "There is nothing in the house that interests me. I would like to look over the premises. From what I

(Testimony of William P. Clements.)

have information of it wouldn't be in the house." He said, "Well, come on in the house anyway." Up to that time I had said something to him about a still. I told him I had information there was a still on the place. I told him this when I told him who I was, that is, prior to entering the house. He said, "There is no still around here that I know of," and invited me into the house. After I got into the house I discovered something that had the semblance of a still. I did not have a conversation with Connley with reference to that appliance that I remember of; and that was all that I remember having happened in the house. I then turned around and went out the door, walked over to this distillate shed and saw these 50-gallon barrels of distillate there. And I also noticed this tank that was sunk out in front. Connley wasn't right with me but close to me, between the shed and the house, at that time. After I discovered this distillate I had a conversation with Connley. I came back and said to him, "Where is it?" And he says, "I don't know nothing of anything around here." When I asked him, "What is it?" I did not designate what I had in mind; but our conversation previous to that had been about a still. There was a very well defined road down the hill at the corner of the house. And I said, "Let's take a walk down here and see what this is." He was not under arrest at the time. We, that is, Agent Alles, myself and Connley, went down that road and the defendant Verda went about halfway down to the still and he stopped on the side of the hill. I do not remember that I had any further conversation with Connley until we got to the top of the still. There the defendant Connley said, "There is no use going

(Testimony of William P. Clements.)

down in here." He was at that time on the ladder in the still, probably on the first or second step of the ladder, with most of his body out of the hole. I was within three or four feet of him right at the top of the hole that went down into the still, and the other agent was right at the side of me if I remember right. Connley might have been standing on the top rung of the ladder when I so addressed him, with most of his body out of the hole, although he had started down the hole. I am positive that he had started down. Connley did not make the descent at his own request. I believe I said, "Let's go down in there and see what it is." And he went down without protest. Connley said there was no use of us going down in there; that we could fix this up right here and could all make some money out of it. I am sure that he told me his name was Walker when I shook hands with him, when I told him who I was. Eventually I got down to the bottom of the hole, and do not remember any further talk with Mr. Connley after I got down into the hole. I placed Mr. Connley under arrest in the hole but had no conversation with him other than that he was under arrest for possession of an apparatus and for possession of liquor. The still was not in operation when I went down there. The boiler was not hot. It was warm. It had a 40-horse-power boiler on it, a steam boiler, that they used to cook mash with. There was no fire under it at all. They were using oil for fires and that was turned out. When I drove up to the house on the Bruno Ranch I first saw the truck that I have testified about. It was a Federal truck. I got the license number. Had occasion to look at the registration and found it registered in the

(Testimony of William P. Clements.)

name of O. B. Ziegler, 151 North Avenue 20, Los Angeles. C-9518 is the 1929 license number. The next time I saw that truck it was standing behind the defendant Quirin's house. That was around 30 minutes later. But time traveled fast and I wouldn't be sure; there was so much doing all at once. I took the rotary off the distributor and have it here. I did that for the purpose of stopping the ignition. I went to Quirin's house first. There was nobody there. The house showed signs of being inhabited. I didn't search it. I just walked through it to see if there was anybody in there. And there was nobody in there, and I turned around and walked out and went to Elsinore. Subsequently I returned to the Quirin house and the truck was gone. At that time I found Herman Quirin, the defendant here, at the premises. I walked in the house; did not rap; did not ring a bell. The door was open and I walked in. I saw the defendant Quirin standing in front of the mirror shaving. He spoke first, saying, "What do you want?" I told him I wanted him. At that time I told him I was an officer of the law; told him I was a federal officer. I had my buzzer or badge on. The badge is marked, disclosing the fact that I was a prohibition agent. I had my badge on my vest under my coat. I told Quirin he was under arrest; that I was going to take him over to —I told him he was under arrest for a violation of the prohibition act. He said, "What are you going to do? Are you going to take me over there and put me on the spot?" I told him no; that I didn't want him if he wasn't guilty and, if he was guilty, I wanted him. He said he didn't know nothing about the place over there. Up to that time, as a matter of fact, nothing had been said by

(Testimony of William P. Clements.)

either of us as to that place over there except when he was talking about putting him on the spot some place. He eventually accompanied me; and I took him over to the Bruno Ranch. And eventually all of the defendants were gathered together there and subsequently incarcerated at Elsinore.

REDIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: I made an effort to locate the owner of the Federal truck, of which I gave the license number, without any success. I did not find it in the possession of the man in whom it was registered. I have had experience trying to locate the owners of trucks under similar circumstances. I did not find anybody by the name of O. B. Ziegler. I looked for him. I have stated that I took part of the ignition. I am no mechanic on automobiles myself. But this rotary is a connection on the ignition. The rotary is on the distributor and it is impossible for a car to run without one, I know. I know and knew at the time I took it off. I have never seen the truck since. It disappeared. The truck was gone when I came back to the house.

RECROSS EXAMINATION

BY MR. BELT.

THE WITNESS:

The appliance, which I have said resembled a boiler, was in a room on the north side of the house, inside it. It was in the second room of the house on a side with no entrance from the outside of the house. You would have to come through the bedroom, or through the dining room and the bedroom, to put this boiler in there. I couldn't

(Testimony of John Alles.)

say that this room is a closet. That house is a funny built house. It was a room I would say about 6x12 or something like that. I don't remember whether there was any window in it or not. I think there was a window right behind where this boiler was sitting. I had occasion to examine the boiler. I didn't examine the top and bottom very carefully but I did examine it. It had a bottom in it. I took possession of it. It is in my possession now at the Los Angeles Warehouse.

(Whereupon the rotor, or rotary, was introduced in evidence and marked Government's Exhibit No. 14.)

THE WITNESS: This boiler in front of the house was a round boiler about 30 inches wide. It was taller than it was wide, being between 4 and 5 feet tall. There was some kind of a connection at the top. I wouldn't be sure what it was, it having been two months since I saw it.

JOHN ALLES,

a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: My business is that of a federal prohibition agent. I am acquainted with the agent who just left the stand, having been working with him for a year. On the 21st day of January, 1930, I was with Mr. Clements on the ranch known as the Bruno Ranch in the afternoon some time past 1 o'clock. I saw the defendant Joe Verda and the defendant Walker at that time, seeing the defendant Joe Verda first. I was at the gate leading into the ranch at the fence, that is, the gate coming in

(Testimony of John Alles.)

from the north, the one marked "D," when I first saw him. We were at that time north of the gate, that is, outside it. At that time Verda was on the east side of the house marked "E," slowly walking or ambling toward us. He was waving at us with a red handkerchief. When I observed that we were coming up through the lane to the house. We traveled, I imagine, about 50 or 60 feet away from the house up to the time we came to him. We were driving in a car, Clements and myself, in a Chrysler coupe. When we came to where Verda was he was in the left-hand track. He was in our way. We had to turn out of the ruts or the tracks to miss him. He got in our way and, in order to avoid striking him, we had to go off the road. He stood there waving us down and we had to turn out. We drove past him and stopped the car about on the corner of the house marked "E," on the map; and Mr. Connley came up. There was no immediate conversation with Mr. Verda. We talked to Mr. Connley first. Mr. Clements spoke to Connley. I overheard the conversation. He said, "Hello," or something; and I said, "Hello." And we shook hands. And I believe Mr. Clements asked him who the ranch belonged to, or whose place it was. And Mr. Walker says, "Why, I am the only one here," outside of the defendant Verda. And it appeared to me the place was called the Walker Ranch at that time. Mr. Clements then said, "Well, we are federal officers," and pulled out his badge; and I pulled out mine and told him we had information there was a still there and wanted to look the place over. And he says, "Okay. Come on and look around." Mr. Verda went to the door and says, "Come on and look in the house." So we went in the house. In

(Testimony of John Alles.)

a little room off to one side we found this copper. I would say it was the top of the column to a still. I have seen plenty of stills before, a good many of them. A column is a portion of a still, that is, the top extending up above the cooker itself, which it vaporizes through It is not what is known as a water heater that is usually connected with a stove. This was a copper apparatus. It was built on a boiler top, with little pipes fitting through the center, allowing the vapor to rise through it. When I found that I said, "Well, where is the rest of it?" I was addressing either Connley or Verda at the time they were there together. Their answer was, "That is all there is. There isn't anything here. I never saw that before." Mr. Clements went out of the house about that time and I took my time following out, looking around the house a little. I asked Mr. Verda if he lived there and he says yes, he slept there. And he says, "This is my bed." It was a bed, or I would say it was a dining room, where there was a table and a cook stove, and a room to the east of it. When Mr. Clements returned toward the house from the distillate shed there we met just outside of the door; and Mr. Clements said, "Well, let's go down here and see what is down here." There was a trail where you might say they walked down from the house, and there was a road where cars and vehicles would go down. He said, "Let's go down here and see what is down there." And we walked down and Mr. Connley stayed right with us. Mr. Verda didn't feel inclined to go down. He stopped about half-way down. We told him to come on down with us and he just stood there and looked at us. And, after I told him to come down with us a couple of times, Mr.

(Testimony of John Alles.)

Connley says, "All right; come on down." So he gradually walked down with us. By that time we were at the top of the hole. I don't remember exactly if I went down first. I think I did. And Mr. Connley started down second and Mr. Clements was still on the top of the hole. And I made some remark about, "Gee, it is a big one." And Mr. Connley said, "Well, we can fix this up right here. There is no use going any further." Mr. Clements said, "Well, do you know who owns this or who it belongs to?" He says, "Well, I don't know. But I can get hold of the owners and we can straighten it up right now; and we need not go any further." And we went out of the hole then and looked around. And two fellows out there in the field started walking off of the premises. At that time we were coming out of the hole. Mr. Verda was within the enclosure, approximately 10 or 15 feet away from the hole. He didn't come very close to us. Now, we got out of the hole there, climbed out of it up the ladders. And in the meantime Mr. Clements told the two defendants they were under arrest and started back to the house and went on through the house and started tracing pipes out of this reservoir. When I came out of the hole I observed Verda. He was standing about 10 or 15 feet away from the hole, not doing anything at that time. We, Connley, Verda, Clements and I, went back to the house and looked in that stone or cement reservoir and examined a little dug-out place with some 2x4s there that Mr. Connley was showing us he was working on to build a water tank that was there; and he was down there for that. And I asked him how long he had been working

(Testimony of John Alles.)

there, and he thought a while and thought it was a matter of 10 days. And Mr. Verda said he had only recently come there, a matter of about four days. So he said Frank Ramiro, a Spanish man, had hired him to come down there and keep the place up. He said he was supposed to keep the place in ship-shape and take care of odds and ends around there and feed the mules and also to be paid $30 a month. And we asked him if he had been paid any of it yet; and he said Ramiro had advanced him $3 to buy eats with so he could live there. And we asked him where he met this man and he said on Main Street in Los Angeles. He was out of a job and pounding the sidewalk. About that time Mr. Clements left and I was left in charge of Mr. Verda and Connley. I then talked to one and the other, sometimes both collectively. Mr. Verda asked me if I wouldn't leave him go. He said he didn't have anything to do with it. He didn't know it was there and had no connection with it. And I told him I couldn't leave him go. And Mr. Connley, sometimes called Walker, then chimed in and said, "No; he hasn't got anything to do with it. He is just a fellow around the house here." And he said, "You have got me. What more do you want? You don't need a dozen of them. That is what I thought it looked like when two of you came up here. It didn't look like much of a pinch with only two of you. And I thought it would be a good chance to get down to business and talk this over." I don't know how it came up but I told him I was only making $200 a month. And he says, "You don't mean to tell me you are working on a job for $200 a month if there isn't a chance to make some

(Testimony of John Alles.)

dough on the side?" He says, "Everybody from the White House on down is getting theirs. You might as well get yours. It looks pretty good only two of you coming up here; and we can get together on that." And I made the statement that Mr. Clements had better get back from Elsinore pretty quick or else the banks would close. And he said, "That don't make any difference;" that they could get all kinds of dough. About that time there was a small gasoline engine running off at the bottom of the slope from the north of the house, pumping water. The engine was running and Verda—I never could understand him half the time anyway—mumbled something about going down there and shutting it off. And Mr. Walker asked me if he could go down and shut it off, and I told him yes, he could go down and shut it off. He went down to shut it off. I imagine it was about 100 feet down to that pump. The house was between the pump and the still. The house is on the south side of the still, angling off to the east, kind of angling southeast from the house and this pump was directly north from the house. In the meantime these two men that were out in the field there were so far distant I didn't know who they were. I couldn't recognize any of them or anything. They started up off the premises, as I said before, and started up over one of these hills. And they sat down on some rocks up there and watched us standing there talking. When Mr. Verda went down there and shut off this engine he again pulled this red handkerchief from his pocket and started waving it. When he commenced waving it he was facing these two men and at the same time

(Testimony of John Alles.)

kind of keeping his eye on us. And I told him it wasn't necessary for him to do that because there wasn't any chance of us getting those two men. Anyway when he waved that handkerchief these two guys immediately disappeared over the hill. As to how they got over or at what speed they got over, they left right now. I said to Verda that it wasn't necessary to signal that way. He said, "I wasn't signaling." When I told him that he immediately blew his nose with his handkerchief. In a very little time after that Mr. Clements came back with the Chief of Police Barber and the defendant Quirin. The defendant Quirin was dabbing a little blood spot on his chin. It looked like he had cut himself shaving. And I asked Mr. Clements where he got him and he said down at the house on the highway there. Then Mr. Clements and Mr. Barber went down into the still pit. I stayed in the house with Mr. Walker and Verda. And Verda again approached me about leaving him go while Mr. Barber and Mr. Clements were down in the hole. And I told him I couldn't let him go. He says, "Please. I will run over the hill and I will be gone just like that." I told him I couldn't leave him go. And Walker says, "There is no use talking to him; that is the best he can do. He can't let you go. It looks like we are pinched." Mr. Clements and Mr. Barber then came back out of the hole about that time and I made another trip down there and looked it over and studied a few angles of it.

(Counsel for all of the defendants announced that they did not desire to cross-examine this witness.)

(Testimony of Richard Kelly.)

RICHARD KELLY,

a witness on behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: I have been sick abed for the last five or six days and just got out of a sick bed to come over here.

THE COURT: Mr. Kelly has bronchitis and that may account for his condition of voice.

THE WITNESS: I am the proprietor of the boiler works located at 557 Mission Road, this city. I buy and rebuild and sell boilers and tanks. I have been in business about 30 years. Am acquainted with Pete Valero, who has worked for me for about a year. He was so working in the month of December, 1929.

Referring to March 7, 1929, I at that time sold to one P. Walker a boiler.

Exception No. 2.

MR. GRAHAM: Just a moment. That is objected to on the ground it is entirely without any of the issues of this indictment. The indictment alleges the conspiracy was conceived six months—

THE COURT: That doesn't make any difference about that. Proceed.

MR. GRAHAM: Exception. May it be understood that our objection and exception goes to all this evidence as to what occurred in March, 1929, without restating it each time?

THE COURT: Yes; certainly. Go on.

THE WITNESS: The man that bought that boiler came to my place of business in March of 1929. He was

(Testimony of Richard Kelly.)

a large, heavy man. There are twenty or thirty people in every day talking about boilers and— Referring to your question as to whether a man by the name of P. Walker came to my place of business either in the month of March or July, 1929, and bought a boiler, all those things are of record in our books. Our books are here. I am selling boilers every day. I remember selling a man a boiler by the name of Walker. But they come in every day. I had the transaction with that man personally. He was a large man, is about all I can remember of him. I should say his age was about 30; somewhere around that. He would weigh about 200 pounds; somewhere around that. I wouldn't say he would probably weigh a little over that. After this date I did not sell this same man, P. Walker, another boiler.

Answering your question as to whether I obtained for this man Walker a Thompson boiler, I will tell you how that happened. They wanted terms on a part of the payment of the boiler and they wanted me to arrange to get it, that is, those people that got the boiler did. I think it was in January that these men came in and made arrangements to purchase a Thompson boiler. But we have records concerning that transaction.

THE COURT: Have you got the records here?

MR. OHANNESIAN: We have.

THE COURT: Let him refresh his memory by these records.

(At this time the witness was shown a document characterized by the Assistant United States Attorney as a photostatic copy of a statement upon the letterhead of the

(Testimony of Richard Kelly.)

Thompson Boiler Works, and asked the witness if he had ever seen it before.)

THE WITNESS: I can't see this but I can tell you about the transaction. I can't read it. I can't see it. Anyway, I can tell you all about it without this. These people wanted to get a boiler, that is, two or three people. The man known to me as P. Walker was one of them. He did most of the talking, I guess. He said he wanted this boiler and he wanted to get time on part of it, and he wanted me to arrange to let him have the boiler and pay what he could on it and have a contract on the balance. But Thompson wasn't willing to let the boiler go that way. So I dropped out of it. And they bought the boiler and paid cash for it and I didn't have a thing to do with it. The boiler wasn't charged to my account. They paid the Thompson Boiler Works cash for it. I did not have a thing to do with it. I didn't get a penny out of it or didn't have anything to do with it.

Q How come that upon this photostatic copy that his Honor has upon his desk there it appears to be charged to the Kelly Boiler Works?

THE COURT: It wasn't charged to them. It was billed. It is marked as having been paid in cash.

MR. BELT: Further objection is made that the witness has failed to identify the exhibit as offered.

THE COURT: The witness first said he had the records showing the transaction, but now he says the transaction didn't occur at all. Now, which is right?

THE WITNESS: We have no records concerning this transaction at all. I never had possession of the boiler; didn't own it and didn't sell it. I took them over

(Testimony of Richard Kelly.)

to the Thompson Boiler Works, though, that is, I took the bunch over there. As to whether or not cash was paid by Walker and his companions, I wasn't present. I found out it wasn't going my way and I had other business to attend to. So I didn't pay any further attention to it. This all occurred in January of this year, I think shortly after New Years. I think the date is on that contract there. I think this is the date that is on this sheet. That is the time that this transaction took place. I haven't read it at all. If that is the bill, that is the date. When I am well I can see well enough with my glasses on. I use just ordinary glasses. I am nearly 68 years old. I have my glasses here.

Q. BY MR. OHANNESIAN (Referring to the bill which had been handed to the witness): What is this here?

THE WITNESS: I don't know anything about it. I don't think I have ever seen that paper before. I don't know what transaction that bill refers to. I notice that it is billed to my firm, the Kelly Boiler Works. I take it for granted that that was the date that they got the boiler. As I said before, I didn't have a thing to do with the purchase of the boiler. They bought it themselves because I haven't got any records in my books concerning it at all. I don't know anything about that paper. I notice that the paper bills a boiler to the Kelly Boiler Manufacturing Company. My company did not buy a boiler of the Thompson people on that occasion. It was probably billed to me because they started in to buy the boiler on contract and have it charged to me; and Thompson wouldn't let it go that way. So I just dropped the whole thing and didn't

(Testimony of Richard Kelly.)

have anything more to do with it. I don't remember now whether while I was there negotiating with the Thompson people on that occasion anybody undertook to make out a bill to me. This man Walker who went with me on that occasion was about 30 years old and a large man, weighing 200 pounds or over, and was smooth shaven as near as I can remember. I don't believe I saw him with his hat off. All of the other transactions I had with them are all on our books. Any other deal which we had besides this is all on our books. They got some pumps later, I think, and then returned them again. I don't remember whether we sold to one P. Walker on August 30th three lubricators. All of the transactions are on our books, which are here in court. You can get all of that in the books. I wouldn't carry that in my head. My bookkeeper is here as a witness. She can tell you all about that. I don't pay any attention to the books at all. The book which you have just handed me is my book all right and all entries for the month of August, 1929, to and including November and December, 1929, are in that book and they refer to items sold to P. Walker. If it is in there, it is all right. I think the boiler that these men wanted from me, which they finally got from the Boiler Works, was about a 30-horse-power boiler, made by Thompson. I suppose it carried their name on the boiler. I don't remember the dates when Pete Valero worked for me in the month of December, 1929. In the month of December he went to their place. I didn't know where he was. I instructed him to go. He went to their place. I don't know where it was. They picked him up and brought him back. Some of their drivers picked him up. I know they

(Testimony of Richard Kelly.)

wanted some repairs done; the Walker outfit wanted it. They applied for me to get somebody to do some work for them. I don't remember now who it was that applied. There were four or five of them. There were several of them in there at different times. I don't remember which ones it was ordered this work done. It was before I took these parties over to Thompson's that I had this pump transaction with them. So when Walker came to me after a boiler I had seen him before several times. He did not tell me where the boiler was to go or where the pumps were to go.

Exception No. 3.

MR. GRAHAM: I move that all of the testimony of this witness be stricken on the ground there is no connection shown between these transactions and any of the defendants in this case.

THE COURT: Overruled at this time. You may renew the motion later if the matter is not connected up.

MR. GRAHAM: An exception.

(Counsel for all of the defendants announced they did not desire to cross-examine this witness.)

CONTINUED DIRECT EXAMINATION BY MR. OHANNESIAN.

Exception No. 4.

MR. OHANNESIAN: At this time, may it please the Court, I am somewhat surprised at the testimony given by the witness in some respects; and, in order to call his attention particularly to a transaction had with Mr. Spencer relative to this matter, I want to ask him if he did not have a talk concerning this matter, or rather

(Testimony of Richard Kelly.)

an interview, with Mr. Spencer, the government investigator, about this boiler. Did you not?

MR. GRAHAM: I object to that.

THE COURT: He may answer yes or no.

MR. GRAHAM: I want to state my objection, your Honor. It is objected to on the ground it is an attempt to impeach his own witness.

THE COURT: Overruled. Proceed.

MR. GRAHAM: An exception.

THE WITNESS: Mr. Spencer spoke to me concerning this boiler and its sale and movement and the sale of other articles, such as tubings. And I attempted to tell him truthfully what I knew about it. I recall that Mr. Spencer (whom the witness identified as being a man who stood up in the courtroom) spoke to me concerning the sale of these boilers and other articles to Walker. That conversation took place about two weeks ago in my yard.

MR. GRAHAM: Is it understood that this is all subject to our objection?

THE COURT: Yes; certainly.

THE WITNESS: I don't think anybody else was present other than myself and Spencer; that is, when he came over there first there was some one who was I suppose an officer with him. The second time there wasn't. It was about two weeks ago when he came there the first time and the second time was four or five days later. At that time he was alone.

Exception No. 5

Q BY MR. OHANNESIAN: Did that Mr. Spencer ask you whether or not you had sold a boiler in July,

(Testimony of Richard Kelly.)

1929, to Mr. Walker, alias Mr. Connley, and you said yes?

A No. I—

THE COURT: Wait a minute. Is there any objection to that?

MR. GRAHAM: That is objected to, first, on the ground it is leading and suggestive and, second, on the ground it is an attempt to cross-examine his own witness and to impeach his own witness and, third, on the ground that no mention has ever been made here about Mr. Connley. The testimony has all been about P. Walker.

THE COURT: In view of the character of this witness' testimony and his slowness to answer the questions and the answers as given to the questions sometimes, the court will permit the government not to impeach this witness' testimony, which, of course, is objectionable, but to refer this witness to statements that he may have made heretofore about the same transaction for the purpose of now refreshing his memory. The witness comes on the stand and says he is ill and his testimony, speaking discreetly, is very vague. His memory can't be refreshed by the recall to him of statements. Of course it has to be pretty carefully put.

MR GRAHAM: An exception.

Exception No. 6.

Q BY MR. OHANNESIAN: Following the instructions of the court and not by way of impeachment of the witness, only to assist you in recalling the conversation that you had with Mr. Spencer—

THE COURT: No, not for that purpose; only to refresh his memory so that he may testify from a refreshed memory at this time.

(Testimony of Richard Kelly.)

MR. OHANNESIAN: Very well.

Q With that in mind, do you recall the conversation that you had with Mr. Spencer concerning these matters?

MR. GRAHAM: We object to that on the ground that is not the fact that is material, whether he had the conversation.

THE COURT: Overruled. We need some preliminary steps always before we can walk. Go on.

MR. GRAHAM: An exception.

THE WITNESS: Well, I don't remember the conversation I had with Mr. Spencer concerning these matters. He asked me about buying this first boiler, I think; and I told him all of the records are on the books. I don't carry these dates and books in my head. I have a set of books for that purpose. I don't think that at that time there was any conversation relative to the purchase of the Thompson boiler. If there was I just simply told him I didn't have anything to do with it. I had a conversation concerning a Thompson boiler. I don't remember whether the Thompson boiler was mentioned or not. I thought it was the first boiler they got you were trying to find out about. There was a first boiler. They did buy a boiler from me. I sold tubings to Mr. Walker for the first boiler at a later date. They came and got these tubings themselves, that is, those people that were having the work done came. I don't know who they were. They had three or four drivers that used to come by and pick stuff up. Some of the drivers got it. I don't recall who ordered the tubing for the first boiler but I have a book

(Testimony of Richard Kelly.)

record for that. Everything is in the book. I was present when the tubings were sold for the first boiler. I am the one that sold it. I don't remember what the man looked like to whom I sold it. There were three or four of them in there off and on. I don't know which particular one ordered the tubing. I don't remember the date when I sold a certain number of tubings for the first boiler but I remember I sold them some tubing. It is in the book. I don't know whether I recall or remember the appearance of the man to whom I sold them. There were two or three of them came in there. They didn't give any names at all. All of it was carried in the books under the name "P. Walker." As I said before, P. Walker, under whose name I carried these items, was a heavy set man, weighing something like 200 pounds or more. From the very beginning of these transactions they were carried on the books in the name of P. Walker, which was the only name we had. I got that name at the beginning of this business with them and everything they got was charged to P. Walker. We didn't charge anything to him until they ordered the first boiler. That was when the account started. This first boiler was about a 30-horse-power boiler, not a Thompson boiler. That was bought about a year ago. I dont' remember the date. It is all on the books there. There were two or three of them in there at the time of the negotiations for that boiler. One of them called himself P. Walker. I didn't hear the names of the others. I don't remember whether the same man who called himself P. Walker came in afterwards and ordered the tubings and fittings and pumps and other

(Testimony of Richard Kelly.)

things like that. I only seen him a couple of times. That is how we got our account started under the name of P. Walker, because he ordered this boiler, and everything else went on the book under that account. They paid cash but we made the entries on the books under the name of Walker. They always paid cash. They didn't always pay cash at the time but they would pay it later. They didn't get any credit to speak of. When they got the boiler they paid for it; and those other little items there wasn't any of them that amounted to very much. They usually came in a few days later and paid it. A man by the name of Walker was one of them who spoke to me concerning the Thompson boiler.

(Counsel for all of the defendants announced they did not desire to cross-examine this witness.)

(Whereupon the witness was excused, this being on March 19, 1930.)

(On March 25, 1930, during the examination of Albert Kruse, a witness called on behalf of the plaintiff:)

THE COURT: I don't see why this court shouldn't order that man Kelly in here again.

(The jury was then excused and asked to retire. After the jury had retired the following proceedings were had.)

(After a further discussion:)

THE COURT: I was very well satisfied that Mr. Kelly was determined the other day not to make a witness in this case if he could help it.

MR. OHANNESIAN: I didn't want to bring this matter up and would not have unless it was suggested by the court, because I thought it might in some way interfere with the due progress of this case. I will

(Testimony of Richard Kelly.)

take it up at a later date. But I am willing to abide by whatever ruling your Honor wants to make. I do think Mr. Kelly ought to be brought before this court.

THE COURT: Well, when it comes to the question of identification, certainly Kelly ought to be able to help better than this man.

(After further discussion, which is set out at pages 163 to 166 of this bill of exceptions, transcript pages .....)

THE COURT: Telephone Mr. Kelly and tell him he is to come up without further delay. We will not hold this court up.

THE COURT: Can anyone inform the court as to whether Mr. Kelly is on his way here in response to any telephone message, and, if he is, how long it will take him to get here

(Whereupon, Mr. Kelly appeared in the courtroom.)

THE COURT: Bring him in here. Mr. Kelly, come forward, please. Take a seat there.

(Whereupon, on March 25, 1930, the following proceedings took place in the absence of the jury:)

Exception No. 7

Q BY THE COURT: Mr. Kelly, when you were on the stand the other day the court told you that you were temporarily excused, but that it might transpire that he would call you back, do you remember that?

A Yes.

Q You do remember that. Since you have been here, since you have testified, testimony has come to this court very clearly and in a good deal of detail, that you had business transactions with the man known to you as Walker, a good many times; that on one occasion, with

(Testimony of Richard Kelly.)

reference to a boiler which has been identified as a dismantled boiler on the Bruno premises, which had been bought from you some time prior to last January, you had ordered one of your workmen to rearrange and reset that boiler on its base because of the direction of this customer, whose complaint was that the base of the boiler and the riveting of it to the base had not been sufficiently protected by cement to keep the heat from disturbing the riveting. I am free to say to you and do say it with some emphasis that we were not satisfied with your conduct on the witness stand the other day. It was quite obvious, not only to the court, but to those who witnessed you testify, that you were minded not to be frank. The episode of your glasses, particularly was convincing that you were attempting to withhold from this jury and from this court information which you obviously had. At least, you were attempting to thwart the production of the truth. Now, developments this morning convince the court that you know a good deal more about this matter than you have hitherto testified to; that you are, to say the least, able to identify the man Walker, known to you as Walker, a man whom your records show had been a customer of yours covering a period of time, as the man who came back and had your workman Kruse change the setting of the boiler. And we expect you to get your memory in shape to identify that man if he is in the courtroom. Do you understand what the court means and says?

A Yes, sir.

Q How about it?

MR. BELT: If your Honor please, at this time—

(Testimony of Richard Kelly.)

THE COURT: You can take your exceptions after I get through with Mr. Kelly. I don't care to have Mr. Kelly diverted from what the court is saying.

MR. BELT: I would like to have the record show my objection.

THE COURT: You can make your objection when the time is opportune. These interruptions are disconcerting.

MR. BELT: I think now is the opportune time for the objection.

THE COURT: Now, Mr. Kelly—

MR. BELT: An exception.

Exception No. 8

Q THE COURT: Don't you think you could identify the man with whom you had that transaction?

A I don't know. I haven't got very much of a memory for faces—

Q Do you mean to tell this court that you can't identify a man with whom you had a dozen business transactions regarding two boilers within the last 7 or 8 months?

MR. BELT: I object to the form of the question on the ground it is attempting to intimidate this witness. This witness has heretofore appeared before this Honorable Court and has testified to the very best of his knowledge and authority, and the remarks of your Honor at this time can have absolutely no other effect.

THE COURT: This court doesn't need your help or your advice, Mr. Belt.

MR. BELT: I know, your Honor, but I am repre-

(Testimony of Richard Kelly.)

senting two defendants here, and they are entitled to some protection.

THE COURT: You have your objection in the record. We will proceed with this witness.

MR. BELT: An exception.

Exception No. 9.

Q BY THE COURT: Do you mean to call this court—

MR. BELT: I would like to have the record show, also, if your Honor please, that the court in addressing this witness struck the bench with his fist.

THE COURT: You may have that. You may get a movie-tone in here and put it in a movie, if you want to.

MR. BELT: An exception.

Exception No. 10.

Q BY THE COURT: Do you mean to tell the court you can't identify this man, P. Walker, who had frequent business transactions with you regarding two boilers within the last seven or eight months?

A I only met this man supposed to be Walker two or three times.

Q You met him two or three times? You sold him the boiler first, didn't you, an upright boiler?

A Yes.

THE COURT: An upright boiler?

A Yes.

Q And you had it set on this base in your plant, didn't you?

A No, sir.

Q Beg pardon?

A No, they came and got it and set it themselves.

(Testimony of Richard Kelly.)

Q The base was fastened to the lower part of the boiler in your plant, wasn't it?

MR. BELT: If your Honor please, I object to that as assuming a fact not in evidence.

THE COURT: Let him answer.

Q Wasn't it?

MR. BELT: Exception.

A Why, they took the boiler out there, and afterwards they came back and they got another base for it, as I remember it.

Q BY THE COURT: You remember that?

A Yes.

Q And you remember that there was some complaint in your office that the riveting of the base was not sufficiently protected by concrete, don't you?

A I think they had to change the position of the ring that held the base in place.

Q That was done in your plant, wasn't it?

A Yes.

Q And the boiler and base were there then, weren't they?

A No, just the base.

Q Just the base, the ring on the base was changed? A Yes.

Q At the suggestion of this customer?

A Yes.

Q And Mr. Kruse did it, is that right?

A No, Mr. Kruse—there was twelve men working over there, and I don't remember who did the work.

Q You remember it was done under your direction?

A Yes.

(Testimony of Richard Kelly.)

Q You had a talk with P. Walker respecting that didn't you?

A Yes, sir.

Q And that was when?

A Well, I don't remember the dates; I can't remember the dates at all.

Q Well, you remember that it was the first boiler, the upright boiler, don't you?

A Yes, sir.

Q And then some time afterwards he came back to buy another boiler and you took him to the Thompson people, didn't you?

A Yes, sir.

Q Personally?

A Yes, sir.

Q You accompanied him to the Thompson people?

A Yes, sir.

Q And then he bought tubing of you in various quantities, didn't he, and other fixtures?

A Just one lot—

Q He was there how many times?

A He wasn't there all of those times. He was there about two or three times altogether.

Q And he dealt with you?

A Yes, sir.

Q Now, are you able to identify him if you see him?

A No.

Q What is that?

A No, sir; I couldn't tell for sure.

Q I don't care whether you can tell for sure. Are you able to make a tentative identification?

(Testimony of Richard Kelly.)

A I could tell whether he looked like him or not. He was a large man.

Q Have you got your glasses with you?

A Yes.

Q Will you need your glasses for identification purposes?

A No, I only use them for reading.

Q Just for reading. Then you step down within the bar here, and walk around among the people and see if you can identify that man known to you as Walker, who had those transactions with you.

Exception No. 11.

MR. BELT: At this time I want to renew my objection to the whole of the proceedings on the ground stated in my first objection.

THE COURT: Very well. You have your record. Proceed.

MR. BELT: And I further object to the attempted identification on the same ground.

THE COURT: Proceed, Mr. Kelly.

MR. BELT: Exception.

MR. HERRON: Exception.

Exception No. 12.

THE COURT: You can begin at the blackboard and swing all around inside of the bar; don't go outside of the bar; make a circle and pass the ladies, clear around to the jury box. You can go closer, if you desire.

MR. BELT: Now, if your Honor please, I don't want to appear argumentative or anything of that character, but in directing this witness to make the inspection, your Honor directed him to make an investigation

(Testimony of Richard Kelly.)

of the persons inside of the rail. You did not ask him to go outside.

THE COURT: Let's see. There are 23 persons inside of the railing besides counsel. That is enough.

MR. GRAHAM: If the court please, I would like to call the court's attention to the fact that some of the people involved in the case here are outside of the railing.

THE COURT: Well, we will try the people inside of the railing first.

MR. GRAHAM: Exception.

Q BY THE COURT: Do you see anybody inside of the railing that, in your judgment, appears like the man who had these several business transactions with you?

A Well, I wouldn't say that I could identify any of them, your Honor.

Exception No. 13.

Q You see nobody that resembles that man?

MR. BELT: If your Honor please, I again object to the form of the question. It can have positively no other effect upon this witness than an attempt to intimidate him.

THE COURT: Well, you are getting in your objections.

MR. BELT: Exception.

Exception No. 14.

THE COURT: Proceed, Mr. Kelly.

MR. BELT: It appears to counsel, if your Honor please, that there should be some limit to this.

(Testimony of Richard Kelly.)

THE COURT: The Court is of the opinion that this witness is bound not to be frank. He has convinced the court of that.

MR. BELT: I object to that, if your Honor please.

THE COURT: And he is bound to come through, if it is possible.

MR. BELT: He has answered honestly, to the very best of his ability.

THE COURT: He does not need your help, Mr. Belt.

MR. BELT: I know, but my clients need my help, if your Honor please.

THE COURT: Mr. Belt is a portly man. Does he resemble him?

A What is that, your Honor?

THE COURT: Does Mr. Belt resemble the man who had the business transactions with you?

Q BY MR. BELT: In your opinion, Mr. Kelly, how much do I weigh?

THE COURT: Mr. Kelly is now answering the court's question.

MR. BELT: Pardon me.

A No, I never seen this man before that I remember of.

Q BY THE COURT: What is that?

A I say I never seen this man before that I know of.

THE COURT: Now, Mr. Kelly, walk over here where the bailiff sits and you go around the circle, clear to the jury box and examine the 15 or 20 or 25 individuals that sit up along against the bar, and see if you can find the man that you had business with, or a man who looks like that man.

(Testimony of Richard Kelly.)

MR. HERRON: It may be understood, I take it, if the court please, for the purpose of the record, that we are understood to have made the same objections to each and every question.

THE COURT: Yes, but each time you object you interrupt and disturb the thread.

MR. HERRON: Well, we won't object any more, if the record may show this, that we object to each and every one of these questions.

THE COURT: In whose behalf are you objecting?

MR. HERRON: On behalf of all of the defendants, if your Honor please.

THE COURT: Excuse me. We will not hear your objection, except on behalf of the clients that you represent. Mr. Belt is perfectly capable of taking care of his objections.

MR. HERRON: If your Honor please, at the opening of the trial—

THE COURT: It makes no difference. Mr. Belt is now taking care of his clients.

MR. BELT: If your Honor please, in view of the fact that I have interposed several objections which were overruled, I take an exception. I ask that each question that your Honor has asked will be deemed to be objected to and an exception taken.

THE COURT: That will be satisfactory. Nobody else need to get on his feet and object.

MR. HERRON: With due deference to the Court, I wish to say that I join in that objection, and exception.

THE COURT: Mr. Kelly, kindly follow the Court's directions. Move around in the circle on the other side

(Testimony of Richard Kelly.)

of the table and look at each individual and see if you can see the man with whom you had this transaction, or a man that looks like him.

A Well, I couldn't say that there was anybody that I can—

Q Wait until you sit down before you talk. I can't hear you.

A I wouldn't say that there was anybody there that I could say for sure.

Q I am not asking you whether you can see anyone there that you can say for sure. Do you see anyone there that resembles him, in your judgment, that you saw when you were down there? A. Well, the nearest one down there that I can say that I think looks like him—

Q Which one?

A That one (indicating).

Q Well, that doesn't mean anything. Which one? Where is he sitting?

A He is sitting next to that lady there.

MR. GRAHAM: I couldn't hear that. Will you read that answer, please?

THE COURT: He said he was sitting next to the lady.

Q Next to the lady with the scarf?

A Yes.

Q That looks like the man that you had the dealings with?

A He looks more like him than anybody else that I see here.

Q What is your judgment; is it your best impression that was or was not the man?

(Testimony of Richard Kelly.)

A Well, I couldn't say for sure.

Q I am not asking you whether you can say for sure. What is your impression about it?

A Well, all I can say—

MR. BELT: Now, if your Honor please—

THE COURT: Now, this witness is about to answer, and you are interrupting.

MR. BELT: All right. If your Honor please, if you will bear with me for just a second. Your Honor asked him a specific question, and he gave you an answer that possibly could not be construed in any other light. He said there was only one man in the room that resembled the man that came to the Kelly plant, and he pointed out the defendant Connley. Now, any other questions along that line, in the opinion of counsel, would be surplussage, and would not affect anything at all.

Q BY THE COURT: Mr. Kelly, what is your impression; was this man or was he not the man with whom you had the transaction,—not for sure, but your impression now?

A Well, I would say he looks more like him than anybody else I see down there.

Q Well, does he look like him?

A Well, in a general way, yes.

Q In a general way he resembles the man that you had these several transactions with, is that right? Is that your answer?

A Yes, sir.

THE COURT: Very well. Bring in the jury.

Exception No. 15.

MR. BELT: Now, Mr. Kelly, isn't it a fact that the only way that the defendant which you have pointed out

(Testimony of Richard Kelly.)

here resembles the man that called at your place of business is from the fact that he is portly, heavy set, in other words?

A Yes.

MR. OHANNESIAN: Now, may it please the court, at this period I don't understand that there is any cross-examination necessary, because this is a matter outside of the trial of the case, and has not bearing upon the trial of the case, and it is also understood—

THE COURT: Yes.

MR. OHANNESIAN: (Continuing) —that it is in the absence of the jury, and is not a part of the record.

MR. BELT: Do I understand—

MR. OHANNESIAN: Just a minute.

MR. BELT: I beg your pardon.

MR. OHANNESIAN: At this time I want the record to show that all that has transpired since the absence of the jury is not a part of the record, and as such will not be made a part of the record.

MR. BELT: To which we object.

THE COURT: The record will show that this has been done in the absence of the jury.

MR. OHANNESIAN: And not a part of the case.

THE COURT: And not a part of the case, so far as the jury has the case.

MR. HERRON: And the objections of the defendants are that they are foreclosed the opportunity of examining the man along the same line that counsel is examining him. May the record so show?

THE COURT: You have enough, gentlemen. You have got your record preserved.

MR. HERRON: If the Court please—

(Testimony of Richard Kelly.)

THE COURT: You will have your opportunity of examining.

MR. HERRON: We ask, if the Court please, that we be given an opportunity to examine out of the presence of the jury, and take an exception with respect to the refusal so to permit us.

(At this point the jury returned to the courtroom.)

THE COURT: You may sit down.

MR. HERRON: Exception.

THE COURT: Do you want to question Mr. Kelly?

MR. OHANNESIAN: No, your Honor, we have no questions to ask this witness.

MR. HERRON: We have none.

THE COURT: The court will accept that responsibility, gentlemen, with pleasure, as a matter of necessity.

Exception No. 16.

Q BY THE COURT: Now, Mr. Kelly, you testified the other day that you had several business transactions respecting the sale of a boiler to a man by the name of P. Walker, do you recall that?

MR. BELT: Now, if your Honor please, at this time I would like to object to any questions being asked this witness that your Honor has asked of him out of the presence of the jury.

THE COURT: The court has not yet undertaken to do so. When the court undertakes to do that, why, then you may make your objection.

Q Do you remember that?

MR. BELT: On the same grounds, if your Honor please, as the objections taken outside of the presence of the jury.

(Testimony of Richard Kelly.)

THE COURT: Mr. Kelly—

MR. BELT: Exception.

THE COURT (Continuing): In order to keep your thoughts straight after this interruption, the court will have to repeat the question. This is the question:

Q Do you recall testifying the other day that you had several business transaction with a man by the name of, or who gave you the name of P. Walker, who bought a boiler of you and some other material, shown by your books, and whom you sent over to the Thompson Works for a boiler? Do you remember that?

A Yes.

Exception No. 17.

Q Tell the jury whether you see in the courtroom, a man who resembles this P. Walker with whom you had these transactions.

MR. BELT: I object to that question on the same grounds stated in my previous objection.

THE COURT: Very well.

MR. BELT: Exception.

THE COURT: Your objection is noted. Answer it.

A. I am looking at the people—

THE COURT: Louder, please.

A I am telling the jury I looked at the people around the jury there.

THE COURT: Around the courtroom, you mean.

THE WITNESS: Around the courtroom, yes, and I only see one that I would say resembled this man that went by the name of Mr. Walker. I wouldn't say that was him for sure, but—

THE COURT: Which man is it?

(Testimony of Richard Kelly.)

THE WITNESS: This man sitting over there with the red necktie.

MR. BELT: We stipulate he is pointing to the defendant Connley—I will withdraw that.

THE COURT: You mean the man sitting next to the lady with the scarf on?

THE WITNESS: Yes, sir.

THE COURT: Let the record show the defendant indicates the Defendant Connley alias Walker. Cross-examine.

MR. BELT: No cross-examination.

MR. GRAHAM: No questions.

THE COURT: That is all, Mr. Kelly.

MR. OHANNESIAN: We would ask that Mr. Kelly remain for a few minutes.

THE COURT: You will remain for a few minutes, Mr. Kelly.

THE WITNESS: Here or outside?

THE COURT: Oh, you may sit in the courtroom.

MR. OHANNESIAN: We ask at this time we have an intermission until the usual hour and I will try to get another witness here.

THE COURT: Do you want to talk to Mr. Kelly about this other matter?

MR. OHANNESIAN: No.

(At this point the court, out of the hearing of the jury, directed the Marshal to detain Mr. Kelly in his custody.)

(Testimony of A. G. Barber.)

A. G. BARBER,

a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: I am the chief of police of Elsinore, having been chief approximately four years. Am acquainted more or less in that vicinity; know where the Bruno Ranch is located and had an occasion to go there in the early part of January, 1930, to-wit, on January 21st in the afternoon about 2 o'clock, in the company of Federal Agent Clements. I met Mr. Clements on that date in the City of Elsinore, in front of the City Hall, about 1:30. I was asked to accompany Mr. Clements by himself to go to the Bruno Ranch, as Mr. Clements said to me he had one officer. I accompanied him to the Bruno Ranch. I know where the Elsinore-Perris Highway is, it being marked on the map as "A;" and arrived there about 2 or 2:30 o'clock. Officer Clements was with me, we having proceeded there from Elsinore. Prior to arriving at the Bruno Ranch we arrived at the house of Herman Quirin, indicated on the map as "B." Officer Clements and I went to the house and found Mr. Quirin in it shaving. Mr. Clements said that he wanted Mr. Quirin. Clements said to Quirin, "I want you." Quirin said, "Who are you"? Clements said, "We are officers." And Clements walked in and I followed him. Quirin said, "wait a minute. Wait a few minutes until I get through shaving." And Clements said, "All right." After Mr. Quirin got through shaving Clements said, "Come on and go with us." From the house of Quirin

(Testimony of A. G. Barber.)

we went directly to the Bruno Ranch house. Before we left the Quirin house we made an examination of it. I think there were two or three beds in the Quirin house, that is, the house about 30 feet from the Elsinore Highway. The table was set. The breakfast dishes wasn't cleared off the table yet. Then we proceeded on to the Bruno house marked "E" on the map. When I arrived there I saw the defendants Connley and Vernon (Verda). I knew the defendant Connley by another name, that is, the name Walker. I did not know at that time what his given name was. I asked him what his name was and he said, "My name is Walker." P. Walker is what he told me. I asked him where his car was. He says, "I don't drive a car." Then I says, "Come on. Come through. Let me see your driver's license." He says, "I haven't got it." Then I went on outside of the house west and saw a Ford coach, a 1929 coach, painted brown. I looked in this car and found the driver's license, and his operator's license in with his registration. I noticed it was registered under the name of Peter Connley. I saw the defendant drive that particlular car at Elsinore several times.

Relating to a shed marked "H" on the map, I noticed gasoline tanks there. I couldn't say from whom these tanks had been purchased or to whom they belonged. I do remember very well the tanks and also some 50-gallon barrels of molasses under the shed where the distillate tanks, or iron barrels, were lying at that time. I saw the sunken tank and made an investigation of it to see whether or not it had any leads away from the tank. It had a pipeline leading from the sunken tank

(Testimony of A. G. Barber.)

down toward the still. It went down to the boiler of the still. It was connected to the boiler. I know because I went down and investigated myself. As to the condition of the boiler, it was warm. I went into the house marked "E," known as the Bruno house, and made an examination of it. I saw that column lying there and two beds in a bedroom south from where this column was. I saw a table set there in the kitchen. I think I counted for seven persons, counting the knives and forks and plates and cups and saucers. I did not notice a bell or buzzer in that room but we discovered a push-button in the next room east of the kitchen at the Bruno house located behind the door jamb of the door leading from the kitchen into this off room east from the kitchen. It was in working order. I had traced the wiring from the still under the house to the batteries and from the batteries up to the push-button. The wiring extended down into the pit where the still was located, the wire being approximately 200 feet long. It was underground; and at the other end of the wire there was a bell placed on a 8x8 post holding the roof of the covering of the still. I identify Government's Exhibit No. 9; and in that picture I observe the bell on the post. That particular bell was connected with the push-button found in the Bruno house because I had occasion to place a man by the name of Powell down in the still and I went up and pushed the button myself to find out whether or not it was alive.

(Whereupon counsel for the defendants stipulated that the bell worked.)

(Testimony of A. G. Barber.)

THE WITNESS: I observed that there was in the pit seven large vats about 8 feet high and 11 or 12 feet across, made of redwood. The seven vats were full of mash and I would say there was about 8,000 gallons to the vat. I found some alcohol in the pit, there being two large galvanized tanks approximately anywhere from ten to thirteen hundred gallons. I noticed many 5-gallon tins there similar in appearance to those we have in the courtroom here. The alcohol that was found there was taken back by the orders of Mr. Peters, I believe. I had nothing to do with the drawing of the alcohol into tins and taking it away but I was there when it was taken away.

(Whereupon Mr. Herron for the defendants informed the court that, if the government would assure the defense there was alcohol in the cans, they would stipulate to that fact; and that, if the government would assure the defense that the cans contained alcohol in excess of one-half of one per cent, they would so stipulate. These assurances being given, these facts were, by stipulation, admitted to be true.)

(Counsel for the plaintiff, Mr. Ohannesian, then asked the defendants to stipulate that no government tax had been paid on it for manufacturing the liquor. Whereupon Mr. Graham, of counsel for the defendants, stipulated that the defendants had not paid any tax.)

(Counsel for the defendants further stipulated that there was a still in the pit, as stated by the witness and as shown by the photographs; that these defendants did not register it with the Collector of Internal Revenue and didn't have anything to do with registering it.)

(Testimony of A. G. Barber.)

(Whereupon two cans of mash were marked as Government's Exhibit No. 16.)

THE WITNESS: I examined the mash in the large tanks. It was in the process of fermentation. It was fermenting.

(The two cans of alcohol were received in evidence and marked as Government's Exhibit No. 17.)

THE WITNESS (Referring to Government's Exhibit No. 10): I recognize the picture. The man represented as standing there is myself. I examined the boiler shown in the picture, which was of about 30-horsepower capacity. I could not say whether there was anything to indicate from whom it was purchased or from what boiler works.

(Counsel for all of the defendants announced they did not desire to cross-examine this witness.)

(It was further stipulated between counsel for the respective parties that none of these defendants did, or intended to, obtain a permit from the Collector of Internal Revenue to transport, manufacture or possess any intoxicating liquor.

(It was further stipulated by and between counsel for both parties that no one registered the still found on the Bruno Ranch with the Collector of Internal Revenue.)

DIRECT EXAMINATION RESUMED

BY MR. OHANNESIAN.

THE WITNESS: Prior to the raiding of the still I had no conversation with the defendant Bruno pertaining to anything in regard to the still or any business going on there of any kind. After the raid I had such a conversation.

(Testimony of A. G. Barber.)

THE COURT: This is receivable only in Mr. Bruno's case. Proceed.

THE WITNESS: At the house known as the Bruno Ranch on the Bruno property Mr. Bruno said to me that Verda had worked for him I understood him to say in the capacity of cook and laboring around the premises. Nothing else was said by Mr. Bruno that I recall. Mr. Verda was present at these conversations which occurred on January 21st in the afternoon. And Verda said to me that he was working for Mr. Bruno; that Mr. Bruno was his boss. He said he was getting $30 a month. But I wouldn't be positive as to that.

THE COURT: This testimony is received also in the case of Verda but not as to the other two defendants. I mean just that portion of it.

THE WITNESS: With reference to the pipeline from nearby the house of Quirin, located about 30 feet from the Elsinore-Perris Highway, I noticed a 2-inch pipeline coming out of a mine shaft in the direction toward the still. I saw where the other end of the pipeline extended to and it extended down by the still into what I would say was a water pit or reservoir. This water pit, although I didn't measure the distance, was close to the still proper or the haystack. I found no other source of water supply for the still other than this pipeline. There was no other source of water supply that I have seen. I searched exhaustively for it and found none. Directly opposite the letter "K" on the blackboard there appears to be a break in the pipeline, "M" representing the pipeline. After my first examination on January 21st I noticed a break in the pipe, that

(Testimony of A. G. Barber.)

is, it being pulled apart. On the date of January 21st there was no break and there was a continuous pipeline from the mine directly down to the still. I went down into the mine and there found a gasoline engine down in the shaft about 60 to 65 feet; but I did not measure it accurately. I did not have any conversation with anyone as to the ownership of the mine pumping plant or pipeline after this or any other time, nor did I take up the ownership of the pipeline with anyone. I examined the pipeline the second time, Officer Spencer and a Mr. Woods being with me. And I then made an effort to bring the pipes together to see if they connected. Spencer and I—I don't remember whether there was a third party there—pulled the pipe over. There was a broken joint there, which I knew was broken recently because I had seen it together prior to that time, that is to say, two or three days prior. I have seen the defendant Herman Quirin before; I couldn't say just how many times. I didn't make a special effort to count them but I have seen him several times in and around Elsinore. At times I have seen him with Mr. Connley and at other times I have seen him with Mr. Bruno. I have seen him approximately four or five times with Connley. And I wouldn't say it was three or four times with Bruno but I know that I have seen him more than once. I saw the three of them together, having seen them close together out there by the Quirin property while I was going along the highway at different times. At the time the ground was disturbed there there wasn't any sign of grain, that is, on January 21, 1930, there was no grain there. The haystack was there and it was

(Testimony of A. G. Barber.)

in the same condition as when it was knocked over on the 21st. About two weeks ago I had occasion to go out there and about three or four days ago; I think it was last Friday. I noticed that the grain was up quite high. The grain was planted up to between 10 and 15 feet from the still. There was a barbed wire fence around the haystack and the grain was planted very close to the stack of hay, inside the barbed wire fence as well.

CROSS EXAMINATION

BY MR. BELT.

THE WITNESS: When the defendants Connley and Quirin were taken to Elsinore, I don't remember whether Mr. Connley and Quirin or Mr. Bruno were in the car I was in. However, we eventually reached Elsinore, but the defendants were not booked in the Elsinore jail. They were just booked temporarily under the name of Peter Walker, I think. I don't remember whether he was booked under the name of George Walker. He wasn't booked with me. He was booked with the constable, and transported into Riverside. I was there at the time of the booking, but I did not see the booking. There was no booking, just held. The federal authorities—Mr. Peters was there present and ordered Constable Boyle to transport him to the Riverside County Jail. What happened there I have no first-hand knowledge of. I do not say that the defendants were not booked in any manner while they were in the City Jail in Elsinore, but say that they were not booked to my knowledge. They were in the custody of Constable Boyle. He is not present in court. I do not know how

(Testimony of A. G. Barber.)

long a period of time the defendants Connley and Quirin were in the City Jail at Elsinore. I am in charge of that jail.

Exception No. 18.

Q BY MR. BELT: Isn't it your practice when a prisoner is incarcerated in your jail to book him under a name?

MR. OHANNESIAN: Just a minute. We object on the ground that it is incompetent, irrelevant, immaterial.

THE COURT: He says he doesn't know he was there. Objection sustained.

MR. BELT: An exception.

THE WITNESS: He (Connley) was there, not to languish, but only as a convenient stopping place. The records of my jail do not show any record of this arrest. I was not present when the defendants were booked at Riverside. I was first on the ground up there at the Quirin residence on January 21, 1930, between 2 and 3 o'clock, just a short period after the raid. I examined the premises very carefully and had my attention directed to the alleged pipeline from the mine out by the Quirin property, down onto the Bruno property. I noticed that pipeline. I followed the pipeline up, starting from the mine, clear down to the inside of the Bruno property, down to what I would say was the pit by the still. The pipe on that occasion was continuously connected from the mine to the Bruno property. There was no dislocation at any place. All the connections were made so far as the line was visible above ground.

(Testimony of A. G. Barber.)

CROSS EXAMINATION

BY MR. GRAHAM.

THE WITNESS: This pipeline from the mine shaft by the Quirin property went to the inside of the Bruno property, down to the still. I remember a large square cement reservoir up near Bruno' house. That is what I mean by the pit. I didn't say the still pit. I said "the pit," and mean the reservoir there by the house.

(Whereupon the court was transferred temporarily to the premises referred to as the Bruno Ranch, in order that the court and jury might view the premises.)

(Whereupon the court, with all parties present as before, proceeded to a point about 5 miles from Elsinore, California, and stopped at the mouth of a mine near the home of the defendant Quirin.)

(Whereupon, being questioned by the court, the witness Spencer testified as follows:)

THE WITNESS: Noticing that we have a line of pipe disconnected right over the brow of the hill from the shaft, ending at the hole there, where there is a valve, it was not in that shape at the first time I saw it. The first time I came on the job here was two days after the still was raided and this pipe was coming straight down the hill about 15 feet from the end of this one. By "this one" I mean the one that is partially buried in the ground where it is now. The loose part was pulled back about 15 feet from the stationary pipe. It had been pulled right back. These weeds were all bent over. This brush here was all bent over. It was not beyond this bare spot here. It was right over the edge of this brush. The part that come out of the

(Testimony of A. G. Barber.)

shaft hole was lying just where it is now within an inch or two. I wanted to see that this joint fit the pipe that turned south. So I asked Chief of Police Barber of Elsinore to help me move this pipe back over to the long end of the pipe to see if the joints fit; and in moving it back this joint up here on the hill snapped. When I moved it back I moved it just about where it is now. At that time there was a fitting on the end of this long pipe in addition to the one there is now, and that is a Tee, a 2-inch Tee. One opening of the Tee extended up the hill and the other out toward the road. Somebody has taken that off. I will show you how the Tee was and we will let the folks decide here whether, if the Tee were screwed onto the end of the pipe which is partly buried, the Tee could or could not be fastened to the other end of the pipe which comes down out of the shaft where the valve is. This was a Tee with three openings. The side was screwed on here. The side opening in the Tee was screwed on just like I have this can now and this end was open. There was nothing in it and neither anything in that end; no fitting known as a union or anything like that; just the naked Tee. The whole pipe was approximately 12 or 15 feet back away from the end of the pipe which was buried. And when the whole pipe was about in the position where it is now the end where the valve is extended 12 or 15 feet beyond the end of the pipe, just partially buried just like it is now.

(Whereupon the following colloquy occurred:)

(Testimony of A. G. Barber.)

"MR. HERRON: In other words, the photographs, which we now call to the attention of the court and jury and which we ask be marked by the clerk, or the reporter, for identification, depict the situation substantially as it is now? Or we can introduce it when we get back. You gentlemen can look at it and you will know it does. That is the one right there and this is the other one.

"THE COURT: Either this stuff has been disturbed or else that is taken wrong end to. The pipe is on the wrong side of this radiator top.

"MR. HERRON: I think not. That is how it would lie geographically.

"THE COURT: No. This is where you have got it buried here.

"MR. HERRON: No. This is that pipe that goes into that bush.

"THE COURT: Oh, you mean this pipe? I thought you mean that pipe.

"MR. HERRON: No. You gentlemen will observe this is substantially the same situation. We, of course, don't know how many times it has been moved in the days that have gone by. That is substantially how it was at the time it was taken.

"MR. SPENCER: If that pipe laid back where it originally belonged it would show this to be up there.

"THE COURT: I am sorry but that photograph doesn't show this pipe. It shows a pipe with a bend in it.

"MR. HERRON: No. There is your bend. Apparently the pipe is turned over. That is your bend.

(Testimony of A. G. Barber.)

If some one stepped on it your bend would be down instead of sideways.

"MR. OHANNESIAN: Let's pull this pipe over.

"MR. HERRON: I don't think there is any materiality in it, anyhow.

"MR. OHANNESIAN: It would be a different angle as to that pipe.

"MR. SPENCER: Shall I straighten that joint out up there?

"THE COURT: Mr. Spencer, do you remember seeing this joint which is adjacent to the pipe in the ground at the time?

"MR. SPENCER:" That was screwed in exactly as it is now.

"THE COURT: Then was this horizontal pipe, the one that is loose at both ends, connected with the pipe through the Tee?

"MR. SPENCER: No. There was no connection more than there is here now. The Tee was on this fitting of the pipe. If that joint up there were straightened out it would throw this in a proper angle to show how that Tee would connect.

"THE COURT: At this joint here?

"MR. SPENCER: Yes, sir. I would like to straighten that out. You see this curve in the pipe here that is rolled here will throw that angle like that.

"MR. HERRON: In other words, your thought is a Tee would connect those two?

"MR. SPENCER: There is no question in my mind.

"THE COURT: Laying this loose joint over?

"MR. SPENCER: Yes, sir, that joint there. Chief Barber found this pipe first connected, and I got here

(Testimony of A. G. Barber.)

two days later. And during those two days this had been disconnected and this piece screwed in.

"THE COURT: Well, we will have to have him testify to that. That, of course, ought to go out of the record.

"MR. DOHERTY: Here is one thing I would like to point out to the jury. You will notice this length of pipe coming down the hill more or less follows the contour of the hill, and the straight angle that comes out points in a direction over here.

"THE COURT: We will have to have Mr. Barber's testimony on that subject. It becomes increasingly important now. I think we had better go down there now to the other place, if the jury has this sufficiently in mind to understand the testimony. We had better move on."

(At a pit a short distance from the mine the witness Spencer testified as follows:)

THE WITNESS: This is the same pipe; the same line. There are two more places here in the field, where the grain is planted, that I want you to see here; but there are none between here and the house except those two that stick out. I can show them to you.

"MR. HERRON: I think the jury should notice at this point that from the house on the hill which has been referred to in the testimony as the Bruno house the Quirin house down by the road is not visible, or vice versa.

"THE COURT: Yes; that is plain.

(At the gate entering the Bruno premises the following stipulation was entered into:)

(Testimony of A. G. Barber.)

"MR. HERRON: May the record show that there were no 'Keep Out' signs and no 'U. S. Officers' on the gate at the time of the arrest of the defendants, other than these that have been admittedly put up by the United States Officers?

"THE COURT: That is, none put up by the defendants.

"MR. HERRON: None put up by the defendants; yes.

"MR. OHANNESIAN: Gentlemen, your attention is called to this road, which does not turn towards the still but turns towards the highway.

"MR. HERRON: Yes. In other words, if they wanted to go to the still they would have had to make a turn."

(In a field on the Bruno premises.)

"MR. OHANNESIAN: Just a minute, Mr. Herron.

"MR. HERRON: Is there a pipe there?

"MR. OHANNESIAN: Yes.

"MR. HERRON: We will concede it if there is.

"THE COURT: Gentlemen of the jury, there is an out-cropping of a pipe here.

"(At a well and pump below the Bruno house.)

"MR. HERRON: This is the pump, as I understand it, which the testimony shows Mr. Verda came down and shut off. You will notice a pipe runs out and, if you will follow it up the hill, it has been exposed in places.

"MR. CLEMENTS: Here is the 2-inch pipe here.

"THE COURT: That pipe is from this well. Here is the other pipe.

"MR. OHANNESIAN: That is from over at the pump. Where does this pipe go?

(Testimony of A. G. Barber.)

"MR. HERRON: The watchman told me it was one that ran from the well.

"(At a reservoir near the Bruno house.)

"MR. HERRON: This, gentlemen, is the small pipe concerning which I was talking about a moment ago down at the well. It goes into the domestic water supply in the house, as you can see by the pipe on the outside of the house.

"MR. OHANNESIAN: It is not contended that small pipe furnished water for the still.

"MR. HERRON: Oh, no.

"MR. OHANNESIAN: This is the reservoir that has been referred to, gentlemen of the jury, a number of times, and that 2-inch pipe that we followed from the mine.

"MR. HERRON: In other words, it runs up and empties into this reservoir as you see it.

"MR. OHANNESIAN: Yes, sir.

"THE COURT: That is a discharge from the pipe from the mine, gentlemen. That is the end of the line we have been following up here.

"MR. SPENCER: The discharge from this tank here empties right on the inside of the well there with a 2-inch pipe, and it runs straight out here and down to the still. While this pipe is disconnected U. S. Agent Banta disconnected it because every time it rained the water ran down and filled the still pit up.

"THE COURT: Was it siphoning out?

"MR. SPENCER: There was no valve anywhere in the line.

(Testimony of A. G. Barber.)

"MR. HERRON: It is by gravity, I think, from that hole there, Judge.

"THE COURT: You will notice the hole there.

"MR. HERRON: As I recall it in the record I think it was some place around here where there was some lumber. Didn't some agent testify to some lumber?

"MR. SPENCER: Over there.

"(At some lumber a short distance from the reservoir.)

"THE COURT: The jury will notice this discharge pipe here. How about this pipe over here?

"MR. SPENCER: This pipe was directly connected to that. U. S. Agent George Banta disconnected this pipe here and put this long piece of pipe in the place of it for no particular reason, and took the fittings out of the mine where the power pump is to see if he could rig up some way to get a bath out here. He had been here about a week and felt awfully dirty. So he took the fittings with him out there. I saw him disconnect this primarily. And he had a union, too, and he took the union and the short nipple over there with him.

"THE COURT: There is a half union there.

"MR. SPENCER: There were quite a number of fittings scattered all around here.

"(Outside of the Bruno house.)

"MR. OHANNESIAN: This is the house that was marked as the Bruno house and where it is said there was found a bell. I assume the jury would like to go in the house and see that bell.

"MR. HERRON: Is this what was referred to in the testimony as the dining room?

(Testimony of A. G. Barber.)

"BY SOMEBODY: This is the dining room; yes, sir.

"MR. OHANNESIAN: What room is that?

"MR. HERRON: That is the room, as I understand it, where they found the copper column. Is that right?

"MR. GRAHAM: Is this the room in which you found the copper column?

"MR. SPENCER: Yes.

"MR. CLEMENTS: Right there is where the copper column was setting.

"THE COURT: Where was the bell?

"MR. CLEMENTS: We have the bell in a warehouse in Los Angeles.

"THE COURT: Where was the button?

"MR. CLEMENTS: The press button is out here.

"MR. DOHERTY: That is the place where the bell button is in there.

"MR. CLEMENTS: We have the wire, button and bell in the warehouse in Los Angeles. The batteries were underneath the floor in the basement and the wire went out under the corner of the house.

"(In the yard outside of the Bruno house.)

"THE COURT: Mr. Clements, when you got here to make the raid is it right that the bales of hay were entirely in place?

"MR. CLEMENTS: They were.

"THE COURT: So that nothing was visible but hay and the corrugated iron roof?

"MR. CLEMENTS: It was.

"THE COURT: And was the canvas where it is now?

(Testimony of A. G. Barber.)

"MR. CLEMENTS: It wasn't bundled up that way but it was thrown over the sugar.

"MR. OHANNESIAN: When I came out the sacks were visible from this point and the canvas was over the sugar.

"MR. CLEMENTS: The canvas was over the sugar when we came out.

"THE COURT: The hay was around the frame work of the still house?

"MR. CLEMENTS: Yes, sir.

"THE COURT: How many bags of sugar did you say you found there?

"MR. CLEMENTS: 86, I think; but I wouldn't be certain.

"MR. SPENCER: We put the galvanized iron around there to protect it from this recent storm.

"(At a shed in the yard of the Bruno house.)

"MR. OHANNESIAN: I want to call attention to this shed here. This is the shed that has been referred to from time to time during the taking of the testimony; and this is one of the barrels of molasses that has been referred to, and these are the drums.

"MR. CLEMENTS: Those distillate drums were all set out the same as these and there was some hay on the tops of them. The mules have eaten some of the hay.

"MR. HERRON: And, incidentally, the mules were here when you came, were they?

"MR. CLEMENTS: They were.

"MR. BELT: Mr. Clements, the jury would like to have you point out that buried drum.

(Testimony of A. G. Barber.)

"(At the point where a drum was buried in the ground.)

"MR. CLEMENTS: This is the steel drum.

"MR. HERRON: Was that old canvas covered over it when you saw it first?

"MR. CLEMENTS: No; it was not.

"THE COURT: Was it open like that when you saw it?

"MR. CLEMENTS: It was.

"MR. OHANNESIAN: Your attention is called to the distillate pipe here.

"MR. HERRON: Let the record show that the small pipeline running from the distillate tank down to the still has been raised somewhat from the soil.

"MR. CLEMENTS: I traced it different places.

"(At a point outside of the still.)

"MR. OHANNESIAN: This is the sugar. Were these openings closed at the time you came out?

"MR. CLEMENTS: No; they were not.

"MR. GRAHAM: Were they open just about as they are now?

"MR. CLEMENTS: Yes, just about as they are now. In fact I think they were all open. The first one I saw was that one over there and it was open.

"THE COURT: Are these the openings to one large tank?

"MR. CLEMENTS: Every tank has an opening on top.

"(Down in the pit.)

(Testimony of A. G. Barber.)

"THE COURT: I want the jury to see the number of the boiler and then the reporter may take it down. It is in small letters and rather difficult to see.

"A JUROR: It is '55,000.'

"MR. OHANNESIAN: And on the fire box appears the name of 'Thompson Boiler Works.' That is correct, isn't it?

"MR. SPENCER: Yes.

"MR. OHANNESIAN: Then on the rear end of this boiler also appears the name 'Thompson Boiler Works, L. A.'

"A JUROR: There is a number '735' up above the '55,000.'

"A JUROR: And there is 'Bukens, F. I. E.' and there is room for a letter in between. Probably the 'R' is missing. And underneath it says '55,000.' That may be 55,000 gallons capacity.

"THE COURT: I don't believe it can be the number of the boiler.

"MR. SPENCER: That '55,000' I think is the tensile strength of the sheet.

"MR. OHANNESIAN: I want to call attention to the fact that on this portion of the still, on the water column, it bears the name of the Thompson Boiler Works also.

"THE COURT: Mr. Clements, you see the mirror hanging there. Where was it when you first saw it?

"MR. CLEMENTS: It was about in that same place. It was in there some place. I don't remember so much about that mirror but it was back there.

(Testimony of A. G. Barber.)

"THE COURT: Did you notice it to know whether the stairway could be seen or anybody ascending or descending the ladder could be seen in the mirror?

"MR. CLEMENTS: I saw the mirror when I came down the ladder, but I didn't look in it.

"MR. BELT: I think by looking in the mirror itself it will appear that you cannot see the stairway. The purpose of that mirror, I imagine, is to read the gages on the side.

"MR. GRAHAM: The purpose of the mirror is to read that thermometer that is hanging there.

"THE COURT: You see these two copper stacks here extending from the pit up. Is each one what you call a column?

"MR. CLEMENTS: It is.

"THE COURT: Has the jury gone through the excavation here and seen the number of tanks?

"MR. CLEMENTS: This is an alcohol tank.

"THE COURT: Let them go through first and see it.

"MR. OHANNESIAN: Your Honor, I want to call the attention of the jury to the character of the timber that is used in here, the size and height and different dimensions. We will be able to show, I think, by testimony where this lumber came from and by whom it was ordered. I ask that they notice these upright columns are 12 feet high and the size and number of them. I think you will find there are eight of this size. We can show where these came from and, likewise, the heavy timber that is in the boiler room.

"THE COURT: You have seen these alcohol cooling tanks, have you?

(Testimony of A. G. Barber.)

"A JUROR: Yes.

"THE COURT: Mr. Clements, show the jury where the bell was and the wire that led to it.

"MR. CLEMENTS: We took it away. The wire went on back up here and followed out along the side up there to the outside. Where the sacks are here is where the wiring went out along the pipeline.

"MR. OHANNESIAN: The water supply is in this wooden tank up here, and Mr. Spencer has gone up there to investigate it.

"MR. SPENCER: This is the water tank here.

"(Outside of the still near some boilers.)

"THE COURT: Mr. Spencer, you were here how soon after the rain?

"MR. SPENCER: Two days.

"THE COURT: Tell the jury whether or not this old boiler was here when you got here.

"MR. SPENCER: It was lying where it is now; yes, sir.

"THE COURT: And the pieces over there, too?

"MR. SPENCER: Yes, sir.

"MR. OHANNESIAN: Is that the first boiler that was referred to as having been purchased—

"MR. SPENCER: This is the boiler that was bought from the Kelly Boiler Works on July 25th.

"MR. HERRON: Do you know that of your own knowledge?

"MR. SPENCER: That is what they told me. But we have the documents to show that.

"MR. HERRON: We ask that that go out, then.

"THE COURT: That will go out.

(Testimony of A. G. Barber.)

"MR. OHANNESIAN: I call your attention to four or five new pieces of tubing here, gentlemen of the jury, right by the baled hay.

"THE COURT: You will notice a quantity of unused tubing that is about 1½ inches or 2-inch tubing. Isn't it?

"MR. OHANNESIAN: We would like to call the jurors' attention to the number of bales of hay that surround this stack.

"MR. HERRON: What is the number?

"MR. OHANNESIAN: Approximately 130. I was told that.

"MR. GRAHAM: Were you told that by one of the officers that did count them?

"MR. OHANNESIAN: Yes.

"MR. HERRON: Did one of the officers count them?

"MR. SPENCER: I counted them.

"MR. HERRON: Well, we can stipulate to that when we get back.

"(On top of the still.)

"THE COURT: If the jury is interested in seeing one of these columns from the top similar to the ones which you saw from the bottom, you are invited to come up here and see one. Here it is.

"MR. OHANNESIAN: We want to call the attention of the jury to a water tank here apparently to supply the water, with a 2-inch pipe reduced to an inch and a half; and that there is an automatic shut off valve.

"THE COURT: Does counsel for the defendants want to see that?

(Testimony of A. G. Barber.)

"MR. HERRON: No. If the United States Attorney says it is there we know it is, knowing him.

"(At the side of the still.)

"MR. OHANNESIAN: I desire to call the attention of the jury to some yeast that is here, evidently in poor condition. I think it will be stipulated it is yeast. It can be told upon the wrappers that it is.

"MR. GRAHAM: I don't think there is any question about it.

"MR. CLEMENTS: The yeast was covered up.

"MR. OHANNESIAN: And there is a septic tank connected with this, too, that I think the jury ought to know about.

"THE COURT: Mr. Clements, for the purpose of the record tell the jury where that discharge of the residue of the mash was.

"MR. CLEMENTS: It is directly back of the still in that clump of trees.

"THE COURT: Distant about 150 yards?

"MR. CLEMENTS: You can see the pipe from here.

"THE COURT: Yes; I see some of it. Is there a creek or something down there?

"MR. CLEMENTS: That is an old wash. The cesspool is covered over and has been dug out.

"MR. HERRON: With brick sides?

"MR. CLEMENTS: Wood, I think.

"MR. HERRON: If you say there is a cesspool there, we will take your word for it.

"MR. CLEMENTS: You can smell the mash there.

"MR. OHANNESIAN: Gentlemen, it is the government's position that these two cylinders formed one boiler here.

(Testimony of A. G. Barber.)

"THE COURT: This is fitting on this end here, having been cut apart apparently by an acetylene torch, or something like that.

"MR. OHANNESIAN: There will be evidence concerning this tank and its removal and the time it was put out here and also these tubings.

"A JUROR: (On top of the still.) I want to sight across from here and see whether or not there is a gravity flow from the reservoir we looked at by the house into this still.

"ANOTHER JUROR: What did you find out?

"THE FIRST JUROR: It comes in considerably below the bottom of the house.

"(At the Bruno house.)

"MR. OHANNESIAN: The witness, Mr. Clements, stated when he came out here the first time the gate to the fence below us was open. Is that correct?

"MR. CLEMENTS: Yes.

"MR. GRAHAM: The gate to the large enclosure around the haystack?

"MR. OHANNESIAN: Yes.

"MR. HERRON: I would like to go to the back gate and follow the road around, unless you can stipulate to it. I can tell you what the fact is that I have in mind.

"THE COURT: I want to have the record show that the court is adjourned for the day.

"MR. HERRON: I think we ought not to adjourn it yet until this is shown.

"THE COURT: All right. In order to avoid the necessity of stopping later let's stipulate that the record may show that court adjourned at 4:30.

(Testimony of A. G. Barber.)

"MR. GRAHAM: There is one more thing I want to do. On the way out we want to go out the back way.

"THE COURT: Yes; but that will be after this time, so we can go on our way, and adjourn until 10 o'clock tomorrow.

"MR. GRAHAM: Yes.

"MR. HERRON: We just want you to observe that this road runs to the back gate, around the back line of the plowed area to the point where it meets with a road that runs along the fence on the east side. Then it follows around back of those hills, coming into the Elsinore-Perris road at a point just practically, by the speedometer, a mile from the Quirin house, measuring a mile from the Quirin house toward Elsinore.

"MR. GRAHAM: Another thing we wish to call your attention to is the road which comes down to the back gate runs to those houses which you observe up on the hill. The jury might also note the goat pens over there and the goats, which will probably be referred to later in the testimony. And the jury will note that the two gates here are practically opposite.

"MR. OHANNESIAN: We would like the jury to observe the number of acres that are under cultivation in grain or barley or wheat.

"THE COURT: What would you say it was?

"MR. OHANNESIAN: Approximately 19 or 20 acres.

"THE COURT: Oh, it is more than that.

"MR. HERRON: Let's let the jury observe it.

"MR. OHANNESIAN: All right. And that is all within an enclosure.

(Testimony of A. G. Barber.)

"MR. HERRON: Let's make a stipulation to this effect: The United States Attorney and the attorneys for the defendants stipulate that the road which comes in the front gate of the ranch property runs by the house and out the back gate, and opens into a road which follows the back line of the Bruno property, where it joins a road which comes up the side line of the property and goes around past the front gate. Also, that from the point where the road leaves the back gate of the ranch and travels down and joins the road coming up the side of the ranch the road extends straight ahead and angles back over around the hills, coming into the highway running from Elsinore to Perris, which was the paved highway we came up, at a point about one mile closer to Elsinore than the Quirin house is located.

"MR. OHANNESIAN: That is a correct statement.

"MR. HERRON: In other words, there is a road leading into the back of the ranch from the highway as well as the front.

"MR. OHANNESIAN: I also call attention to the fact that the road on which we are now standing is at least four hundred feet nearer to the still than any portion of the road pointed out by counsel as leading into the main highway.

"MR. HERRON: It is four hundred feet nearer to the still than a portion of the road four hundred feet farther away. They both come to the same point. And the path down to the still would be at right angles to that road, is that it?

"THE COURT: Isn't that a road straight across over there?

(Testimony of A. G. Barber.)

"MR. HERRON: Yes; there is.

"THE COURT: That is connected with the road on which we are standing at right angles?

"MR. HERRON: Yes; we stipulate to that.

"MR. OHANNESIAN: In addition to that, that gate is a distance of at least four hundred feet from the still, whereas we are within one hundred feet of the still.

"MR. GRAHAM: Yes. And let the record show it is twice as far from the front gate to the still as it is from the back gate to the still. Isn't that right?

"THE COURT: I should think that is so; yes.

"MR. OHANNESIAN: And we call attention to the condition of this road, too, that it is not a used road. The road referred to by counsel here is not a used road and the road leading into the still is apparently a used road from the appearance of the thing.

"MR. GRAHAM: We also want to call attention to the fact that there are two roads leading to the front gate of the Bruno Ranch.

"MR. HERRON: When you say it is not a used road you mean it is not used as much as the other road, is that it?

"MR. GRAHAM: It is apparent that there are two roads leading to the front gate of the Bruno Ranch, one which comes past the Quirin house and the other coming off of the Elsinore to Perris highway at a point one mile nearer Elsinore than Quirin's house.

"MR. OHANNESIAN: One road being nearer than the other.

"MR. GRAHAM: That depends where you are standing.

(Testimony of Russell F. Thompson.)

"THE COURT: Haven't you enough of this geography now, gentlemen?"

(Whereupon an adjournment was taken until the following morning, when the case proceeded in the courtroom as before.)

(At this time Government's Exhibit No. 18, a photostatic copy of a bill of lading, was marked for identification.)

RUSSELL F. THOMPSON,

a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: I live at 2128 Rimpau Boulevard; am assistant manager of the Thompson Boiler Works located at 1000 North Broadway. We have been in business in Los Angeles since 1903. My line of work is mostly selling. The Thompson Boiler Works manufacturers steam boilers and hot water heaters and valves and necessary fittings. I am acquainted with Mr. Kelly, of the Kelly Boiler Works, only slightly. I believe that on the 8th day of January, 1930, I saw Mr. Kelly. He was in company with several men. At the time I had very little conversation with him. Directing my attention to Government's Exhibit No. 18 for Identification, I recognize that. I have the original of it. It is not with me. It is in the office.

Exception No. 19

MR. OHANNESIAN: Is there any objection to our making use of the photostatic copy?

(Testimony of Russell F. Thompson.)

MR. GRAHAM: We object to it being introduced in evidence and we object to any testimony concerning it because it is entirely irrelevant as far as any of these defendants are concerned.

THE COURT: You don't object to the use of the photostatic copy?

MR. GRAHAM: Not on that ground; not because it is a photostatic copy.

THE COURT: You will accept that as freely as you would the original if you considered it competent, is that it?

MR. GRAHAM: Surely.

THE COURT: You may proceed. We will see whether it is competent.

Q BY MR. OHANNESIAN: Using that in order to refresh your recollection, what transaction, if any, did you have with Mr. Kelly and the gentlemen that were with him that day?

MR. GRAHAM: That is objected to on the ground it is hearsay as far as these defendants are concerned and it is entirely irrelevant.

MR. OHANNESIAN: This is in line with the testimony.

THE COURT: This is so far preliminary. I think this may be answered.

MR. GRAHAM: We object to it on the further ground that it is an attempt to impeach their own witness Kelly.

THE COURT: This is a different proposition. You cannot impeach in a formal way your own witness. You can introduce other witnesses whose testimony may be so

(Testimony of Russell F. Thompson.)

far different on the same subject from the testimony of this particular witness as to serve as a contradiction. There is a difference between impeachment and contradiction.

MR. HERRON: May we have an exception?

MR. GRAHAM: An exception.

THE COURT: Yes. Proceed.

Exception No. 20.

THE WITNESS: May I have the question?

(Question read.)

THE WITNESS: Mr. Kelly brought some gentlemen over that wanted a boiler of about 40-horse-power, as I understand, who went to buy it from him; and he did not have the article they needed in stock but he thought we would. So he brought them over to us to get what they wanted; and we sold them a boiler.

MR. GRAHAM: I move that answer be stricken out as incompetent, irrelevant and immaterial and hearsay.

THE COURT: The objection is overruled for the time being. You may renew it later if not connected.

THE WITNESS: I describe the character of the boiler that was sold as a 40-horse-power dry-back Scotch marine type. It carried my name on the front of the combustion chamber and a small plate there possibly and two plates on the back end with our name on, and on the front edge inside of the smokestack and initialed "T.B.W." It also carries a serial stamp of the boiler inspection, the Board of Mechanical Engineers, inspection office. The boiler that I sold had a water column. The name of the Thompson Boiler Works appeared on the column, too, as we manufacture those. In the month of

(Testimony of Russell F. Thompson.)

January, 1930, I sold only one 40-horse-power boiler of the type described.

Exception No. 21.

Q BY MR. OHANNESIAN: Was there any conversation between you and the men and Mr. Kelly as to where this boiler would be used or taken?

MR. GRAHAM: That is objected to as calling for hearsay.

MR. OHANNESIAN: That can be answered yes or no.

THE COURT: Yes.

THE WITNESS: All I can state is what I was told.

Q BY MR. OHANNESIAN: By someone there?

A Yes.

Q What were you told?

MR. GRAHAM: That is objected to as hearsay.

THE COURT: Now, read the question before that.

(The question was read as follows: "Was there any conversation between you and the men and Mr. Kelly as to where this boiler would be used or taken"?)

THE COURT: You may answer that by yes or no.

MR. OHANNESIAN: I will change that and ask by one of the men who came with Mr. Kelly.

THE COURT: Yes. Answer that—by one of the men that came with Mr. Kelly.

MR. GRAHAM: The same objection, if your Honor please.

THE COURT: Yes. Was any statement made as to where the boiler was to be used by any of the men who came with Mr. Kelly?

A Yes.

Q BY MR. OHANNESIAN: What did he say?

(Testimony of Russell F. Thompson.)

MR. GRAHAM: Objected to as calling for hearsay.

THE COURT: Overruled at this time. You may renew it, if necessary, if the situation changes.

MR. GRAHAM: An exception.

THE WITNESS: I was told it was going north of Bakersfield.

Exception No. 22.

Q BY MR. OHANNESIAN: Was anything said by that individual as to why this boiler was being purchased?

MR. GRAHAM: The same objection.

THE COURT: He may answer.

MR. GRAHAM: An exception.

THE WITNESS: I don't know how to answer that question exactly. I understood that it was for oil.

Q BY MR. OHANNESIAN: Well, what was said? State what was said.

MR. GRAHAM: If your Honor please, I understand this is all going in subject to the same objection.

THE COURT: Yes; you are saving your record right along.

MR. GRAHAM: Yes.

A I understood there was an oil proposition up north of Bakersfield where their old boiler went out, and they had to have another one immediately.

THE COURT: Was that what was told you?

A Yes; by one of the men that came with Mr. Kelly. Subsequent thereto the boiler was taken away by these men.

(The attention of the witness was thereupon directed to Government's Exhibit No. 10, which the witness examined.)

(Testimony of Russell F. Thompson.)

THE WITNESS: After examining the picture I would say that it is a picture of the boiler that I sold to Mr. Kelly and the gentlemen that were there on January 8th. I find upon the front end of the boiler, the combustion chamber, the words "Thompson Boiler Works." This boiler was paid for in cash; I do not know by whom except it was paid for by one of the men that was with Mr. Kelly. It was taken away the same evening by the men that came with Mr. Kelly. I did not see them take it away. I left probably just a half hour before it was taken out. I saw the men who were there at that time with Mr. Kelly. There were three or four or five men. For this boiler I made only the statement or bill here, making it out in the name of the Kelly Boiler Works. The Kelly Boiler Works did not participate by way of commission or otherwise in the transaction. Mr. Kelly brought these men over and then they stayed there a few minutes and then Mr. Kelly left. The men stayed there until they had the boiler loaded, that is, they paid me the money; and they had a truck there and we were loading it on the truck for them and the men went away and came back later and then I left. I was there until the boiler was practically on the truck. Our men loaded the boiler on the truck with the crane in the yard. The men who came with Mr. Kelly were still there. They waited for the boiler.

Exception No. 23.

MR. OHANNESIAN: At this time, your Honor, I wish to offer in evidence the exhibit marked for identification as the Government's Exhibit of the appropriate number.

(Testimony of Russell F. Thompson.)

(Whereupon Government's Exhibit No. 18 was admitted in evidence.)

MR. GRAHAM: We object to it on the ground it is hearsay as far as any of these defendants are concerned and entirely irrelevant, no connection being shown between any of these defendants and this transaction.

THE COURT: It is not altogether hearsay now because this witness has identified the boiler in question with the boiler at the place under investigation. The articles are identical, according to the testimony, and in addition to that the witness Kelly testified to the same transaction and named as one of the parties dealing for this boiler a man by the name of P. Walker. And there is some testimony, the conclusiveness of which is solely for the jury to pass on, as to the weight of it, which has a tendency in the direction of identifying one of the defendants on trial as one of the parties. So the hearsay rule is not quite applicable any longer. The witness also testifies that this was the only transaction during that month. The witness Kelly yesterday testified to enough to tend to show that the relationship between what he participated in, respecting the purchase of the boiler by P. Walker, and this particular transaction was close, if not identical.

MR. GRAHAM: But as far as this bill is concerned, your Honor, the bill simply purports to set forth a transaction between Thompson Boiler Works and Mr. Kelly.

THE COURT: But that is explained by what this witness says.

Q Why did you make the bill out to the Kelly people?

A Well, I didn't make the bill out myself. The bookkeeper made the bill out, but I remember hearing him say,

(Testimony of Russell F. Thompson.)

"Who is buying this boiler? Who shall we make out the bill to?" And they told him, Kelly Boiler Works.

Q Who told him Kelly Boiler Works?

A The men that gave us the money.

THE COURT: You may have it. Objection overruled.

MR. GRAHAM: Exception.

THE COURT: I am admitting it against the one defendant, or whoever may be subsequently connected with the transaction, if it so turns out.

THE WITNESS: The purchase price of the boiler was $1,450, paid in cash. An attempt was made to purchase on credit.

Exception No. 24.

Q BY MR. OHANNESIAN: Do you know why it was not sold to them on credit?

MR. GRAHAM: That is objected to as immaterial.

Q BY MR. OHANNESIAN: You can answer yes or no.

THE COURT: Was there something said on that subject?

A Yes, sir.

Q By whom?

A By me.

Q To whom?

A To these gentlemen.

THE COURT: Go on.

Q BY MR. OHANNESIAN: What was said?

MR. GRAHAM: That is objected to as hearsay and also it is immaterial.

THE COURT: So far as P. Walker is concerned it is not hearsay. Go on. It may be material.

(Testimony of Russell F. Thompson.)

MR. GRAHAM: Exception.

THE WITNESS: I asked for ratings. I was not given ratings. It was after banking hours and they could not give me ratings. And I told them the only way the boiler could go out was by paying it by certified check or cash. The money was paid then and there. The gentleman who did most of the talking paid for it.

CROSS EXAMINATION

BY MR. BELT.

THE WITNESS: I testified that during the month of January, 1930, I sold but one 40-horse-power boiler. I don't remember that we sold any 40-horse-power boilers prior to that. Our business is mostly small boilers and we do sell large boilers once in a while. We have sold probably seven or eight 40-horse-power boilers in the last six months. In the last year we have sold probably ten.

REDIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: I mean 40-horse-power boilers but we sold none in the month of January other than one. I do not think we sold any in December. I would not know how many we sold in November without looking at the record, but I don't remember selling a 40-horse-power boiler in December. I don't recall selling any in February of 1930.

RECROSS EXAMINATION

BY MR. HERRON.

THE WITNESS: When I say I don't remember selling any I don't mean by that that I didn't sell any. The Thompson Boiler Works employs no boiler salesman except myself. All of the boilers which I sold, notably the 40-horse-power boilers, carried the name of the Company

(Testimony of Fred C. Amsbaw.)

FRED C. AMSBAW,

a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: I live at Wildemar about six miles from Elsinore. I know where the Nick Bruno Ranch is located. I knew Nick Bruno in the latter part of July, 1929, when he rented my team. He came to see me, and brought another party with him, and wanted to get my team. He said he would stand good for the team. This other man that came with him was a Mr. McPherrin, I believe. He, Mr. McPherrin, rode one horse and led the other and taken them up to his place. Mr. Bruno went back to his ranch. They were taking the stock up to his, Mr. Bruno's Ranch. He, Mr. Bruno, told me he was going to do some excavating. I thereafter had occasion to go out on the Bruno Ranch. I remember the first time I was out on that Ranch. That was about the middle of July or something such. I have been there three or four times. I bought a couple of goats from him. The first time I went out there to the Bruno Ranch I saw Mr. Bruno and his wife. One time when I saw him he was milking goats. The first time I went there after he rented my horses it was at the house when I approached the house coming in; but I didn't see him doing anything. I went there a second time and Bruno was around the house. The second time I saw him he was in the house which was part lumber and part adobe, that is, the house on the hill by the trees. I saw him there a third time. He was not doing anything. I once saw him hauling some hay there.

(Testimony of Fred C. Amsbaw.)

I saw him using that team. The first time I was there and saw him using the team he was hauling hay on the ranch. I guess he got his hay various places where he could get it and feed his goats. The first time when he came out to the ranch I don't believe he stated what he had been doing. He was going to use a team, was all he stated. He said he was going to excavate, to level some dirt, I think, move it. He said he was going to use the team to move some dirt and level some dirt at his place. That is all I got out of it. On the first occasion he did not say anything about a pit. I can't say that at any time I saw the team at work. I was by there and saw the team in the corral in the daytime but he had two teams there and seemed to be working them at different times. I did not see the team working leveling any time day or night. I was on the place when the team was hauling but I was not when they were working with the dirt.

Exception No. 25.

Q BY MR. OHANNESIAN: Were you ever on the place when you saw Mr. Bruno leveling the dirt?

MR. HERRON: We object to that as having been asked and answered.

THE COURT: No; he has not been asked that particular question.

MR. HERRON: Exception.

A No; I wasn't. I was at the place there one time when the dirt had been changed around at different times when I was there, it was different, because it had been plowed up there; but I didn't see any team working at hauling any dirt or any such. I did not see any team leveling or hauling dirt about. I did not see anyone level-

(Testimony of Fred C. Amsbaw.)

ing dirt there with a team or without a team day or night. I had more than one conversation with Bruno. The second time I had a conversation with Bruno was with regard to a goat, about me getting a goat. I had no other conversation; just those two occasions. That is all I talked to Mr. Bruno. The horses were brought back to my place from Wednesday to Wednesday. That was a week, seven days, they were kept. A boy brought the team back. I would judge he was about 18 or 19 years old.

I have seen the defendant Herman Quirin. He is in the courtroom. I first saw him when he came and got the team. That was about the first part of June. I had a conversation with him. I talked with him. He stated that he was going to use the team for excavating purposes. I believe he stated they were going to have two teams and run different shifts. That is all he said. I talked with him and I told him the team had been on pasture and they weren't in good condition to do a great lot of real lugging work, that is, in the way of moving dirt. He said they would work them in the afternoon when it was cooler. He said they were going to move some dirt with the team on the place. My wife and I were there when that was said. Mr. Quirin was present talking to me. There was a boy with him. When I saw the team it was on Bruno's place. After the team was taken back Herman Quirin came there and took the team away himself. He took the team to Bruno's Ranch. I saw the team there once when they took them away. I didn't investigate around at all or ask any questions. Herman Quirin paid for the team. Bruno had one team at one time and then came back and recommended the other man to take the other team. So I fur-

(Testimony of Fred C. Amsbaw.)

nished two teams. This team that Herman took away I think they got for excavating dirt. I did not see that team at work at any time. I know the use they were put to because they told me so. During the time I was on the Bruno Ranch all I saw were some trees being dug out and plowing and where they dug some trees out in this locality. I judged at the time, from what he had been talking to me along on other subjects, about putting in some alfalfa there. That is the only thing I know. I saw a hole down there in the low ground just below the Bruno house, but it looked to me as though there had been a lot of trees dug out there. I did not go up to the hole. It did not interest me at all. I saw work being done in the low ground while I was there. I noticed there was some work done there but I didn't know but what it was being leveled for some alfalfa. I did not go down to see what it was. The trees which I have said were torn out were moved and the stumps were back out of the way more. I saw the stumps. They were fair sized trees. They would cover a space to dig a hole, I imagine, about ten feet in circumference, around. I saw the trunks of the trees. They were willow trees. I noticed the trunks were drug back more on a hill. With reference to the Bruno house, the house is on a knoll and the trees were drug out over on another knoll. The hole out of which the trees came is about where the pit is now. I have been over there and know where the pit is now. With relation to where it now is the trees were growing on identically the same spot. I saw the space on which there now appears to be a stack of hay before the hay was there. There was a little house setting right there where that hay is now when I first saw the place. I

(Testimony of Fred C. Amsbaw.)

saw that the house had disappeared from where it was then. At the time I was there he was building the little tin house where the gas tanks is now. I cannot say that I noticed any buildings going up or work going on where those trees were uprooted that I have just described. I never saw that work going in. After the trees were taken out there was some excavating work done there undoubtedly, which I noticed. I noticed there had been more dirt dug up and moved. I noticed there was a kid there working doing the leveling and an old gentleman there, too.

Directing my attention to Mr. Verda, the old gentleman in the courtroom, I never saw that man there. I never saw any of the defendants that are here out there leveling the ground. None of the defendants told me they had done any of the leveling out there.

Exception No. 26.

MR. OHANNESIAN: Your Honor, I have a matter that I want to call your Honor's attention to, but I would rather call your Honor's attention to it in the absence of the jury.

THE COURT: Yes. Will you please step outside?

(The jury retired from the courtroom.)

MR. OHANNESIAN: Your Honor, I have given to counsel a copy of a statement that we claim was signed by the witness. I would like your Honor to view this statement. This witness was asked, your Honor—

THE COURT: Yes. I will take care of it in a minute.

MR. OHANNESIAN: Very well.

Exception No. 27.

MR. HERRON: We think the witness should be excused during the time—

(Testimony of Fred C. Amsbaw.)

THE COURT (Interrupting): No. The witness will stay here. Now, Mr. Amsbaw, the court appreciates that you may be under some reluctance to testify frankly. I have been in this business so often, especially with reference to violations of this particular law, that I can sympathize with a witness who is a neighbor and desires to be careful. At the same time your government is entitled to have a full disclosure from you of all the knowledge you have, and it appears that on the 7th day of February, 1930, in the presence of Mr. Spencer, the investigator, you made a statement in writing regarding this matter. Do you remember that?

A Yes, sir.

Q BY THE COURT: And you signed it?

A Yes.

THE COURT: Now, I will show you what purports to be that, and ask you if that is the statement that you made?

MR. HERRON: If your Honor please, I feel that for the purpose of the record we must object to this proceeding and this examination.

THE COURT: Very well. You may enter your objection and an exception. Proceed.

MR. GRAHAM: An exception.

A Yes, sir.

THE COURT: Is that statement true?

A Yes, sir.

THE COURT: And it is true, then, that at the time that Bruno came to you in the latter part of July, 1929, he said he had been digging a pit on his ranch and wanted to level down the dirt? He said that, did he?

(Testimony of Fred C. Amsbaw.)

A Yes.

THE COURT: You asked him to go along, that you might drive your team, and he refused and said he had a man to drive it?

A Yes.

THE COURT: And that Quirin came with him?

A Yes.

Q BY THE COURT: And drove the team, yes? That is right, is it?

A Yes, sir.

THE COURT: And this statement that you made refreshes your memory as to what happened in that transaction, does it?

A Yes.

THE COURT: Do you want anything more with this witness before the jury comes back?

MR. OHANNESIAN: No, your Honor, I think not.

MR. HERRON: I would like to ask him a question. Are you certain that those were the exact words, that he had been digging a pit on his ranch?

THE COURT: No, he doesn't have to be certain about the exact words.

MR. GRAHAM: Your Honor, it is very important whether Bruno told him he was digging a pit, or simply was leveling some dirt.

THE COURT: Did he tell you he had been digging a pit?

A He stated he was going to level some dirt where there was a hole.

THE COURT: You say in this statement that he told you he was digging a pit. Is that true or not?

(Testimony of Fred C. Amsbaw.)

A Wouldn't you call a large-sized hole somewhat of a pit?

THE COURT: Yes. But did he say that he was digging a pit?

A He didn't say he was digging—he said a hole.

THE COURT: Now, you say here that he said he had been digging a pit on his ranch and wanted to level down dirt. Did he say that or not?

A The pit proposition is what gets me.

THE COURT: Well, you can remember whether or not he said that he was digging a pit, can't you?

A The hole proposition would be similar to a pit, the way I look at it.

THE COURT: Did he say he had been digging a hole?

A Yes.

THE COURT: He said he had been digging a hole?

A Yes.

THE COURT: Do you think he used the word "hole" rather than "pit?"

A Yes.

THE COURT: And that he had been digging it?

A Yes.

THE COURT: Anything more?

MR. HERRON: Did he say he had been or was going to?

A He had been, and wanted to level the dirt down.

Q BY MR. HERRON: And wanted to level the dirt down?

A Yes, sir.

Q Did you write this report or dictate it, or did Mr. Spencer, the agent, write it up from what you said, and then ask you to sign it?

(Testimony of Fred C. Amsbaw.)

A He wrote it up and asked me to sign it.

Q And the language in that report is his language, isn't it?

MR. OHANNESIAN: We object to that.

THE COURT: He may answer that.

Q BY MR. HERRON: The language in the report is his language, isn't it?

A Yes, it is his language, and yet it might not be just as I worded it, and yet it would make it come out in the right language.

Q It is the same effect, but the exact language is the language of Spencer, isn't it?

A Yes.

THE COURT: But the only criticism you make of it is that he used the word "pit" where you said "hole?"

A Yes.

Q BY MR. OHANNESIAN: It was after Mr. Spencer had spoken to you and asked you what the facts were that he wrote this up, is that right?

A Yes, that there has been typewritten over.

THE COURT: Did you read it over before you signed it?

A Well, I read the paper that was written over.

THE COURT: This paper that you signed here?

A Yes.

THE COURT: And the only modification you would make of that statement would be to substitute the word "hole" for "pit?"

A Yes.

THE COURT: You used the word "hole?"

A Yes.

THE COURT: Bring the jury in.

(Testimony of Fred C. Amsbaw.)

Exception No. 28.

MR. HERRON: If your Honor please, before the jury returns, we wish to enter our objection to this entire proceeding on the ground, first, that there has been no reluctance shown on the part of the witness to testify to the truth; second, that it is examining him upon a statement admittedly employing the words of a government agent, rather than his own words, and I know, without any intention on the part of the court, nevertheless we feel that we must object upon the ground that the questioning by the court out of the presence of the jury upon this statement can have no other effect than to intimidate the witness and to cause him to feel that he must now in effect make his statement conform to the language used in this statement, which was prepared by Spencer, and read over and signed by him.

THE COURT: Well, Mr. Amsbaw, all this Court wants of you is to tell all of the truth about this, not to keep anything back.

THE WITNESS: Well, I will tell you—

THE COURT: Just a minute now. Wait until I get through. We want you to tell the truth. The Court is not trying to intimidate you, and you don't understand that, certainly. He has said here several times in this court that this man actually did say he had been digging a hole. If that is true, we want you to tell this jury. If it isn't true, we don't want it at all. The Court is taking no sides in this case at all, but we are insistent that we shall get all of the truth.

MR. HERRON: We object and ascribe that statement as error, upon the ground that it can have no effect

(Testimony of Fred C. Amsbaw.)

unwitting though the court may be about it, than to intensify in the mind of the witness the thought that the Court might feel that he is not telling the truth, and put him under compulsion to tell another or different story than he was testifying to under oath.

THE COURT: Well, is it the truth that you used the word "hole"?

THE WITNESS: Yes.

THE COURT: Bring in the jury.

(The jury returned into the courtroom.)

MR. OHANNESIAN: Now, Mr. Amsbaw—

THE COURT: The court will ask this question.

MR. OHANNESIAN: Pardon me, your Honor.

Exception No. 29.

THE COURT: Now, Mr. Amsbaw, in the absence of the jury has your memory been refreshed as to what Mr. Bruno said to you at the time he first came to get the horses in company with Mr. Quirin?

MR. HERRON: If the court please, we object to this question and each and every question which shall hereafter be asked of this witness along the general line, for the reasons which I stated to your Honor in the absence of the jury, and each of those reasons.

THE COURT: Now, that objection of yours in the presence of this jury makes it necessary for this court, in order to protect the court, to go something into the reasons why this thing is done. We had hoped to make it unnecessary in the interest of the defense to do that. I will proceed to do it now. You have opened the door.

MR. GRAHAM: May I state we object to the court making the statement as to the reasons?

(Testimony of Fred C. Amsbaw.)

THE COURT: You are not going to make any statement to the jury. We are going to interrogate this man and get the reason.

MR. GRAHAM: Exception.

Exception No. 30.

Q BY THE COURT: Now, Mr. Amsbaw, in February of this year you made a statement about these matters to one of the government agents, Mr. Spencer, didn't you?

A Yes.

Q And that was reduced to writing?

MR. HERRON: In addition to the objection I made, I desire to object on the ground it is an attempt to impeach the testimony of the government's own witness.

THE COURT: No, it isn't. It is an attempt to get all of the testimony of the government's witness.

MR. HERRON: An exception, if your Honor please.

THE COURT: It is not an attempt to impeach him at all.

Q That was Mr. Spencer, wasn't it?

A Yes.

Q And after you told him all you knew he reduced it to writing, didn't he?

A Yes.

Q And you signed it after reading it over; that is true, isn't it?

A Yes.

Q And, having seen that document, your memory is refreshed as to what happened?

A Yes.

(Testimony of Fred C. Amsbaw.)

Q That is what you told the court in the absence of the jury, isn't it?

A Yes.

Q Now, tell this jury substantially what Mr. Quirin said to you was the reason he wanted these horses—or that Mr. Bruno said to you when he and Mr. Quirin came in July last to get your team and rent it of you?

A My understanding was—

Q What did he say in substance, now? What did he say that he wanted the horses for?

A He wanted the horses to level the dirt down from a hole. That is what he spoke to me about.

Q What did he say, if anything, about having theretofore dug a hole?

A He had dug a hole and he wanted to level the dirt down.

At that time I offered to work for him, drive my own team, and he rejected it. He said he had a man.

Exception No. 31.

MR. OHANNESIAN: Your Honor, at this time, if the court deems it necessary, I now submit the written statement that your Honor has referred to, and, in view of the fact that it was used in order to refresh his recollection as to what was said by the defendant Bruno to him, it is offered in evidence in support of the testimony given by the witness.

MR. GRAHAM: We object to it on the ground that it is an attempt to impeach the witness.

MR. OHANNESIAN: It is not for that, and I so stated.

THE COURT: If this is your only objection, it is overruled.

(Testimony of Fred C. Amsbaw.)

MR. HERRON: And we object on the further ground it is hearsay, incompetent, irrelevant and immaterial, being an ex parte statement not made from the witness stand, and admittedly, as stated by this witness, not containing his words but the words of the agent.

MR. OHANNESIAN: There is no such evidence as that at all.

THE COURT: That should not have been said in the presence of this jury.

MR. OHANNESIAN: Counsel knows that and he ought to be cited for contempt for making such a statement, your Honor.

MR. HERRON: It is part of my objection.

THE COURT: But you should not have said that in the presence of this jury.

MR. OHANNESIAN: That is a matter I avoided by asking the jury to leave.

MR. HERRON: Then I will ask the court to instruct the jury to disregard it, or I will ask the witness the question in the presence of the jury.

MR. OHANNESIAN: The statement is not a subject of cross examination. It was not used for that purpose and counsel knows it. From his long experience he knows that his conduct is not correct.

MR. HERRON: I believe my conduct is correct.

THE COURT: We will have no controversy on that subject at all, but we will not submit this statement to the jury because the jury has from this witness the substance of it.

MR. HERRON: Then we will ask that the comments of the court as to what the statement contained, contained

(Testimony of Fred C. Amsbaw.)

in the court's questions to the witness on the statement, be stricken.

THE COURT: I beg your pardon. What do you want stricken?

MR. HERRON: The remarks of the court purporting to read from the statement.

MR. GRAHAM: The statement of your Honor which is, in effect, a statement of what the witness' statement contains, when your Honor said that since the jury had returned he had testified substantially—

THE COURT: You don't mean to question the court's truthfulness about it?

MR. GRAHAM: Not at all, your Honor.

MR. HERRON: Merely the correctness in point of law of the court's action; certainly not the court's truthfulness.

THE COURT: This is made a part of the record. Exceptions by each defendant.

MR. HERRON: Thank you, your Honor.

Exception No. 32

THE COURT: The jury will determine whether the court misread that.

MR. HERRON: We don't want to be misunderstood as questioning the court's truthfulness.

THE COURT: That is what it amounted to.

MR. HERRON: We object to it on legal grounds.

THE COURT: Never mind; it is in. We will not talk about it any more.

MR. HERRON: If the court please, I feel counsel is entitled to have this court and jury understand that at no time did we reflect upon the truthfulness or the fair-

(Testimony of Fred C. Amsbaw.)

ness of interpretation of this or any other District Judge. I have practiced too long in these courts not to know the high character of Federal judges and their honesty and sincerity, to have any such imputation put upon anything I might ever do. I do feel, however, in justice to the defendants I represent, that if the court has committed error, I should preserve that fact in the record in the event the case should be taken up on appeal.

MR. GRAHAM: We mean legal error and not an error in the statement of the court.

THE COURT: There is no question about. You are all right on that. We are not questioning that, but this statement is now in.

Exception No. 33.

Q. What difference is there between the statement as given to Mr. Spencer and reduced to writing by him, to which your attention was drawn, and what you have said to the jury as to the purpose for which Mr. Bruno said he wanted the team?

MR. HERRON: We object to that on the ground it is not the best evidence. The statement is in and the testimony of the witness is in the record, and that is the best evidence.

THE COURT: All right. You admit the statement?

MR. HERRON: No, we don't admit it. It is in the record over our objection.

THE COURT: Then you are waiving your objection.

MR. HERRON: I do not desire to be so understood. I protest against any such interpretation of my statement. I merely called the court's attention to the fact that the statement being evidence and this witness having testified,

(Testimony of Fred C. Amsbaw.)

that a comparison of this statement which your Honor admitted in evidence and gave us an exception to its admission, and the record of the testimony of the witness, is not the best evidence. My objection goes to that.

THE COURT: You are extremely difficult to please. I hope I please you now. The court said to this jury, to which you took exception, that there was no substantial difference between the statement and the witness' testimony, and for that reason we would not permit the statement to go in. Then when we undertook to discover whether there was any substantial difference between the statement and the testimony of the witness, you objected because you say the statement is in. You can't have that thing both ways, so we will leave it just as it is. Go on to something else.

MR. HERRON: An exception.

(Counsel for all of the defendants announced they did not desire to cross-examine this witness.)

(Whereupon the court made the following statement):

THE COURT: Now, gentlemen, about this statement, before we go any further. If you discover anything of substance in the statement to which the witness has not testified, why, to that extent, of course, you ought not to have this statement put in against you. You may examine it and see.

MR. OHANNESIAN: I may state, for the purposes of the record, that I gave to the counsel an original duplicate copy of the statement before the witness was examined, and they had it before them when the examination took place.

(Testimony of Ed. Funk.)

MR. HERRON: That is, you mean before the witness was interviewed, following the first portion of your examination.

MR. OHANNESIAN: Following the first portion, and you have had it with you ever since.

MR. HERRON: Yes.

THE COURT: If there is anything in that statement to which the witness has not testified substantially to this jury, the court will strike that part out, if you ask the Court to. You have the opportunity. Swear this witness.

ED. FUNK,

a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: I live at Warm Spring Valley about a mile and a half northeast of Elsinore. I know where the Bruno Ranch is located. It is approximately four or four and a half miles northeast from my place. I am acquainted with Nick Bruno and knew him in the month of July, 1929, when I had a business transaction with him. I have sold him hay at different times and sold him some hay in the month of July; I don't remember just how much but at one time 60 bales; at other times a few bales at a time and the last time there was a stack of 130 bales. The last stack of 130 bales was delivered in July or August. Mr. Bruno called for these 130 bales of hay and hauled all of it. I hauled one load to his ranch with him. I saw the still for the first time when I went with a federal man shortly after they found the still and saw the still there and the hay piled on top of it. My attention being called to

(Testimony of Ed. Funk.)

Government's Exhibit No. 6, I see in that picture a stack of baled hay. I examined two or three of the bales and am able to say that those are the bales that I sold to Mr. Bruno. I examined the tie of the wire and it was my own tie; and I am able to identify the bales by the tie which I put about the bale. It was poor hay, full of sunflowers the same as what he got. I did not count the number of bales that were about the still and wouldn't say approximately that it was all of the hay that was purchased by Mr. Bruno the last trip. Mr. Nick Bruno paid for the hay. I was out to the Bruno Ranch when a team of mules had been working scraping a hole out there. I saw just one hole. Later I saw it when I went with the federal man and it was in the same place as it was when I first saw the hole. The day I was there the team wasn't doing nothing. They had struck a period like the man wasn't paying them. Nick was with me. He told me that he had leased that place to put it in alfalfa. They were putting a sink hole to put in a pumping plant. This was the same place where I later observed the still located. I have seen the defendant Herman Quirin, whom I recognize as the man in the courtroom with the paper in his hand and with the bald head. At the time I observed him Nick was talking to him.

CROSS EXAMINATION

BY MR. HERRON.

THE WITNESS: Nick Bruno had from time to time bought hay from me. He had not bought hay every year for several years but had bought it the last year. On this particular occasion I sold him some hay and rode out with him to the Bruno Ranch on one load. And, while I was

(Testimony of H. S. Wagoner.)

there, I observed that there had been some scraping done down at the place where I later found the still to be. I noticed some trees had been removed from that place and that was the only occasion on which I visited the ranch from that time until after the raid occurred.

REDIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: I assisted Mr. Bruno in hauling the hay. I unloaded right at the house on top of the hill, between the house and the little shed there on top of the hill. I know where the goat corral is and that was quite a little ways from the goat corral; I would say four or five hundred feet or less.

RECROSS EXAMINATION

BY MR. HERRON.

THE WITNESS: Horses eat hay as well as goats; and mules do also.

H. S. WAGONER,

a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: I live at Elsinore; am a farmer and am acquainted with Nick Bruno. I saw him on or about the 18th day of January at my ranch in the morning. He called there and I had a conversation with him. He asked for a grain drill. He rented the drill. He said he wanted to drill some grain, oats or barley. By "drilling" I mean planting. He did not take the drill away from my place because the drill was down at Mr. Hudson's. I told him he could have the drill if Mr. Hudson wasn't using it; and

(Testimony of H. S. Wagoner.)

I told my boy when Nick came after the drill to go with him down to Mr. Hudson's and show him how to operate the drill. And so he came in the afternoon. I don't know what time of day it was. If this drill was taken away by Mr. Bruno, it was on Saturday the 18th of January. Mr. Nick Bruno paid me for the drill. He was at my ranch on various dates, I believe, buying hay. I couldn't say that he was there on the 20th. He rented a team of horses from me on Monday, January 20th. He came and said that he would like to rent my team on account of not having power enough to pull the drill; that his mules were not strong enough. So the horses were not doing anything; and I said all right and he took them. He told me he was doing drilling with the mules and said he wanted the horses to help pull the drill to plant the grain; that he was going to plant the grain. He didn't say where it was he was going to plant it. He said he wanted to drill some barley or oats. Bruno came to my place alone on the following day, Tuesday the 21st of January, between 1 and 2 o'clock. He said he was through with the drill; and the boy had taken the drill home, or was taking it home. Just a few moments before this conversation he had brought my team back. He, Bruno, paid $1.50 for the team and $2. for the use of the drill. My boy's name is Richard Philip Wagoner. He will be at the high school until it leaves out.

(Counsel for all of the defendants announced they did not desire to cross-examine this witness.)

(Testimony of L. L. Mathews.)

L. L. MATHEWS,

a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: I live at Wildemar. During the latter part of July and the early part of August I saw the defendant Herman Quirin at his house near Elsinore. I had a conversation with him, Quirin, my brother and myself being the only persons present. I asked Quirin about the section lines and the corners. I walked around to the section corner. The defendant Quirin did not go with me. I did not go up to what is known as the Bruno Ranch. Mr. Quirin was not there. I did not have any conversation with Mr. Quirin on the Bruno Ranch. But I did talk with him on a piece of government land about three-quarters of a mile west of Bruno's house; and he came to where I was and asked me if I saw an old mule, and I told him no, I did not. I asked him what they were building down there. I saw a pile of dirt down there, down by Bruno's house. It was about three-quarters of a mile away and I can't say exactly how much dirt I saw. It was quite a pile of dirt. I am not sure that I saw anyone working down around that pile of dirt. I couldn't say as to that but I saw a team there. The defendant Quirin answered my inquiry. He said they were building a cheese factory down there.

CROSS EXAMINATION

BY MR. HERRON.

THE WITNESS: The statement of Mr. Quirin seemed by me to be intended seriously.

(Testimony of N. S. Hotchkiss.)

N. S. HOTCHKISS,

a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: I am in the lumber business; employed at Elsinore by the Dill Lumber Company, of which I am manager, having been manager for a year and nine months. I was in the employ of that company in July, 1929, and have been in their employ since. Am acquainted with the defendant Herman Quirin; am acquainted with the defendant Nick Bruno and am acquainted with the defendant Pete Connley, alias Pete Walker. I do not know Mr. Verda, the old gentleman sitting back there. I have had business transactions with the defendants Quirin and Connley. The date of the first time I had a business transaction with either of these defendants was in August in 1929, when I sold lumber to Herman Quirin. The first time Herman Quirin called to see me concerning the purchase of lumber he came alone. I recall an occasion when more than one of the defendants called relative to the purchase of lumber. That was on January 21, 1929, when the defendants Connley and Quirin came together to my place of business. At that time they made purchases. The government has the accounts receivable ledger sheets in its possession but I have the original tag. These are the original statements of the lumber sold, made out by myself.

(Whereupon Government's Ehibit No. 19 was admitted in evidence.)

(Government's Exhibit No. 19 reads:)

Sold to H. F. Quirin on January 21, 1930:

(Testimony of N. S. Hotchkiss.)

4 6x6-14 common rough; 16 2x12-10, the same;

8 2x6-16, the same; 15 lbs. of 30 common penny nails and 10 lbs. of 40 common.

THE WITNESS: That pile of goods was purchased by Herman F. Quirin and Connley. I see these gentlemen in the court. It was not paid for. The bill of goods was not delivered but was called for by a Federal truck. I did not get the license number and I do not know where that truck went with the lumber. I later on saw the lumber on December 22nd on the Bruno property 20 or 30 feet from the Bruno house on that property. The occasion of my seeing it was that I went to pick up that lumber and bring it back to our yard because of non-payment. I took it back to the lumber company's yard. This particular lot was never paid for. Herman F. Quirin shortly afterward called to see me concerning this lumber, to pay for the lumber secured on January 21st. Nothing else was said or done on January 22nd. I have stated all the conversation and all that took place at the latter conversation. I have with me a list of tags which contain items of building material that we delivered or that was called for by Mr. Quirin, for his house on the highway. I have not examined the house on the highway. I have examined the still and its construction so far as the lumber is concerned. Tag No. 971, dated January 8, 1930, is an item of lumber sold to the defendant Quirin. It is a receipt for cash received from Mr. Quirin, for lumber purchased in December, 1929. It does not indicate the kind of lumber purchased or paid for. Tag No. 796, dated December 20, 1929, is an item of lumber, which consists of four 2x12s-20, and

(Testimony of N. S. Hotchkiss.)

8x8s-14, purchased and paid for by Mr. Quirin. We have no record to show, and I do not know whether it was called for or delivered. Tag No. 728, dated December 16, 1929, represents 2x12s, 2x4s, and 8x8s, purchased and paid for by Mr. Quirin. I do not know where that bill of goods was delivered. Our records do not show, and I do not know which of the items were called for by Mr. Quirin or delivered, but the ones which we did deliver were delivered to the house on the highway. None of it was delivered to the Bruno property. I am not able to state whether the lumber itemized in bill No. 728 was delivered or called for, but it was taken away from the yard and paid for by Mr. Quirin. Tag No. 719, dated December 14, 1929, represents lumber sold to Mr. Quirin, and paid for by him, consisting of 2x12s, 1x6s, and nails. Tag No. 620, dated December 5, 1929, represents 4x4s, cement, and 2x12s, the 2x12s being timbers 2 inches by 12 inches, 10 feet long. These were purchased and paid for by Mr. Quirin. Tag No. 606, dated December 4, 1929, represents one roll of roofing and 10 pounds of nails purchased by Mr. Quirin and paid for by him. Tag No. 577, dated December 3, 1929, represents Sterling board or wall board sold to and paid for by Mr. Quirin. Tag No. 541, dated November 29, 1929, is a receipt for cash for lumber sold to Mr. Quirin during the month of October, 1929. This record does not show the quantity or character of the lumber sold during that month. Tag No. 385, dated November 18, 1929, represents finish lumber sold to and paid for by Mr. Quirin. Tag No. 67 represents 25 2x4s-12, common dimension lumber, sold to Mr. Quirin and paid for by him. Tag No. 6959, dated

(Testimony of N. S. Hotchkiss.)

October 3, 1929, represents finish lumber, hardware and nails, to the amount of $6.73, sold to Mr. Quirin and paid for by him. Tag No. 6960, dated October 3rd, is a credit for merchandise returned by Mr. Quirin, and represents one pair of windows and a piece of finish lumber returned for credit. Tag No. 6910 represents merchandise returned by Mr. Quirin, consisting of two windows and three pair of casement sash. Tag No. 6909, dated September 30, 1929, consists of lumber, nails and windows sold to Mr. Quirin and paid for by him. Tag No. 6884, dated September 27, 1929, represents one roll of roofing and 2 pounds of nails sold to Mr. Quirin. Tag No. 6868, dated September 25, 1929, represents 2x4s and siding sold to Mr. Quirin and paid for by him. Tag No. 6859, dated September 25, 1929, represents 5 pounds of nails and 7 rolls of roofing sold to Mr. Quirin. Tag No. 6858, dated September 25, 1929, represents finish lumber sold to and paid for by Mr. Quirin, consisting of three 1x3s-10, clear Oregon pine, surfaced four sides, one 1x4s-10, the same, four 1x3¾s-14, the same; one 18 the same, one 12 the same; three 16s the same; two 1x5s-14, the same; one 1x5s-12, the same; three 1x5s-16, the same; one 1x5s-10, the same; two 1x4s-16, the same; and 125 feet of ⅝x4s novelty siding. Tag No. 6857, dated September 25, 1929, represents four pieces of 4x10s wall board, 12 sevens, 16 eights, of wall board, 10 pounds of nails, 1 inch and a quarter casement stool, 1 sixteen, the same; two 2x6s-16, clear redwood; one 6 foot, the same; 150 feet 1x6 common O. P., surfaced one side; four 2x3-14, the same; four 16s, the same; one 2x6 select common. Tag No. 6823, dated September 23rd, is a re-

(Testimony of N. S. Hotchkiss.)

ceipt for a check for materials purchased by Mr. Quirin, paid up to date in full. Tag No. 6743, dated September 17, 1929, represents lumber purchased and paid for by Mr. Quirin. The number of pieces is torn off, but the size and length are 2x3-14, 2x3-16, 2x3-8, 2x4-10, 2x6-10, and 1x4-10 foot. No. 3 vertical grain flooring 100 feet. Tag No. 6625, dated September 7, 1929, represents two No. 2046 double hung windows, four No. 3021 light casement, one No. 3604 double hung window; one No. 4016 light sash, and one No. 1838 double hung window. I went to where the still was located on January 22nd, and examined the timber or lumber that was used in the making of the framework of the still. There are several items there in those tags that could be used in the construction of the still, that is to say, that similar timber of kind and dimensions were in fact used in the still. By that I mean the timbers that were used in the construction of the still were heavy timbers, such as 2x12s, 2x6s, and 4x4s, lumber of that character. I noticed Mr. Quirin had a new house near the road, and I noticed the size and character of the house, but I did not examine it to see if any of our lumber went into the house. I doubt if that size of house would use 2x12 joists. There were 2x12 joists in the still, but I could not identify them as having been sold by us. I did not examine the lumber in the mine shaft, and I do not know what kind of lumber was in there.

(Whereupon the 22 tags identified by the witness were admitted in evidence as Government's Exhibit No. 20.)

THE WITNESS: I examined the lumber in the still and found some 4x4 uprights there. I did not notice

(Testimony of N. S. Hotchkiss.)

any 6x6 square timbers as uprights in the still. The ones I noticed were 4x4s.

CROSS EXAMINATION

BY MR. GRAHAM.

THE WITNESS: There were some timbers and lumber in the still, that is, in the framework in the pit in which the still was located, which was lumber other than that which we sold to Mr. Quirin; in other words, there is a great deal of that lumber in there that we didn't sell to him. I would say that 95% of the lumber in the framework of the pit is lumber that we did not sell Mr. Quirin. The other 5% of the lumber used in the framework of the still might have been part of the lumber that we sold Mr. Quirin, but I cannot say that it is. Approximately 5% of the lumber that is in the framework could be part of the stuff we sold Mr. Quirin. I could not give the dimensions of that 5% of the various pieces unless I examined those tickets. The only pieces that I saw in the still framework that corresponded in size to lumber we sold Mr. Quirin were 2x12s.

REDIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: I did not see in the framework of the still any 4x4s which show in these tickets. I did sell some 4x4s to Mr. Quirin, but I have not the tags that show that. I do not recall the number of feet that was sold of 4x4s, but I think it was approximately 20 pieces of 4x4s. In an examination of the still framework I did find lumber there that corresponded to that size and number. I don't know whether these 4x4s went into the making of the house on the Elsinore road. I did not find

(Testimony of N. S. Hotchkiss.)

any other timber in that still or in the framework of the still which I now recall as being timber that I might have sold to the defendants, or timber of like character. I did not notice the heavy timber that was used in the room where the boiler was located or the siding that was used in the room where the boiler was located. Siding is a thin lumber that is used to side up a house. When I say "siding" I mean house siding, the outside siding. I did not notice any of that in the still, but I am not in a position to say that siding was not used in the framework of the still.

RECROSS EXAMINATION

BY MR. BELT.

THE WITNESS: I am not familiar with the property known as the Quirin Ranch, nor with the house Mr. Quirin lived in. I have been on that property, but not while Mr. Quirin was living there. I did not look in the mine that was on the property. The lumber shown on these various items was sold to Mr. Quirin. In each and every instance it was not sold to Mr. Quirin. The cleats shown in the picture of the entrance of a mine are 2x4s. I have seen the house known as the Quirin house since it has been completed. The roofing consists of what is known as red composition roofing. It would correspond to the amount of roofing shown on these bills.

(Whereupon it was stipulated that the siding and casement windows shown on these bills went into the Quirin house.)

(Testimony of Fred R. Ranney.)

FRED R. RANNEY,

a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: I am and for a little over two years have been employed at the Kelly Boiler Works, and was employed there on the 1st of August, 1929, as a bookkeeper. As such I kept the books for Mr. Kelly. The book which is shown me is a day book, in which I kept the items each day as they came up, that is, a part of them. The checks that came in were usually posted directly to the journal, and then from there to the ledger. These entries were all carried from here to the journal, and are the original entries. Part of them were made by me and part by Mr. Kelly. Either he made the entry or called me to make it.

On page 132, under date of July 25, 1929, I find an entry as follows: "Account P. Walker, 916 West Third Street, 1 48-inch by 8-foot vertical boiler, with 10-foot stack, injector, oil burner, and regular fittings. In exchange." The extension is $475, in exchange $100, cash $35, balance $340. He satisfied us with cash or exchange to the extent of $135, owing $340 on the account. The total amount of the purchase price was $475. I don't remember exactly who paid it. Most of the dealings were done with Mr. Kelly, and he carries the money in his pocket usually, and they pay it to him, and he tells me to give them credit for it. However, this particular $35 is in his handwriting, so the chances are it might have been paid to him. The account has been paid. Personally I don't know what became of this 48-inch by 8-

(Testimony of Fred R. Ranney.)

foot vertical boiler with the 10-foot stack, or when it left the place of business. I didn't see it leave. I don't know where it went. It must have been taken away, or it wouldn't have been paid for. At page 135, the first account is in the name of P. Walker, under date of August 1st. The entry is: "August 1, 1929, P. Walker, two single cylinder pumps, $70." At page 145, under date of August 28th, is the item: "August 28, 1929, P. Walker, exchange on boiler $25, repair to pump $5 total $30." On August 30th, on the same page, is the item: August 30, 1929, P. Walker, three lubricators, $10." The account was carried in the name of P. Walker. As I remember, in this particular instance they bought the boiler, and the original boiler that they bought wasn't the boiler that was delivered, and they picked out another boiler, which was $25 more. That is the best of my memory as to the credit exchange of $25. By the initial charge for boiler, exchange $100 and cash $35, is meant the boiler that was brought in, that they turned in toward the one that was purchased. I don't know who brought it in. Mr. Kelly handled the yard, and he has done that business alone so long, and he doesn't give anybody any authority, and nobody knows any prices, and when anybody comes in I refer them to him. When they come in the second time they go to him, because I know very little about the boilers.

At page 157 is the item: "October 1, 1929, P. Walker, 60 fire bricks." This was charged to the account in the name of P. Walker. On page 158 is the item: "October 3, P. Walker, small tank, credit by cash $5," and then the item $1 appears in direct line, that is, for the tank.

(Testimony of Fred R. Ranney.)

The credit of $5 was paid on account, and I don't know who purchased it. It is in Mr. Kelly's handwriting, and is charged to P. Walker. At page 169 is the item: "November 1, charge to P. Walker, one steel base for boiler." And on the same page: "November 6, 1929, charge to P. Walker, use of equipment, $5." On page 171: "November 11, 1929, charge to P. Walker, labor on base (boiler) $5; labor on grates, $7; two pokers at $1.50, $3."

I know Pete Valero. At that time he was working for Mr. Kelly as a boilermaker. On page 177 is the item: "December 11, 1929, charge to P. Walker, sixteen 2x6 tubes at $1.50 apiece, $24; one 2-inch tube expander $15; labor 18 hours at $1.75, $31.50; repairing chain block, $15." I do not know who performed the labor that is referred to as having been done on December 11, 1929, but the record shows that it was the labor of Pete Valero, 18 hours, at $1.75, repairing chain block. I don't know—the chances are that was done in the yard. The books do not show where it was done.

(Whereupon the portions of the book to which the witness had referred, which had been identified by him, were introduced in evidence as Government's Exhibit No. 21.)

The instrument which is shown to me is a 2-inch tube expander.

(Whereupon the tube expander was marked Government's Exhibit No. 22 for Identification.)

(Testimony of Perfecto Valero.)

PERFECTO VALERO,

a witness on behalf of the Plaintiff, testified as follows, through an interpreter:

DIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: On December 11, 1929, I was working for Mr. Kelly. He has this establishment of boilers on Mission Road and Brooklyn. On December 11, 1929, I was finishing a new boiler in the same house, that is, Mr. Kelly's house on Mission Road. Mr. Kelly sent me out in the country to do some work. I don't know the place. They took me out there in a truck at 4 p. m. I arrived at the place at 8:30 at night. It was a small house in a hollow, with some stacks of alfalfa hay in bales.

Government's Exhibit No. 8 is a photograph of the place to which I was taken. I went down under the ground under that stack to work. I saw a boiler and several tanks full of some kind of liquid. I don't know what kind. I did not work on the boiler. The boiler had a very little manhole, and I was too large. The man who took me out there said that he would go in, as he was smaller, and would fit in the manhole. I did not do any work there myself. I stayed there all night, until daylight, probably about 6 o'clock, when they took me back in an automobile. I did no work there. At the time I went out there on December 11th we took 15 tubes with us. We just unloaded them and left them there. I did nothing with the tubing myself after I got there. That is the only time I was there. When I was taken there by these men I spent approximately 18 hours

(Testimony of Perfecto Valero.)

on the whole round trip. When I went out there no one went along except the truckman. I do not know him. That is the first time I ever saw him. I never saw him working for Mr. Kelly. The truck was a large truck. I don't know the kind it was. The man who took me out there was a short man, with a thin face, and would weigh about 135 pounds. When I got out to where the still was located there were two men down below. They were the ones who were waiting there to fix the boiler. These two men were two men other than the one who took me out. One of them was quite stout, about 5 feet 6 inches tall, and would weigh about 200 pounds. I don't remember the other fellow. I couldn't see very well. I do not know anything about any Bruno house. I spent the night down below with the still, by myself. The other three men went off. In the morning another man came after me. I don't know who he was. He brought me back to Los Angeles. He was a short man.

Mr. Kelly paid me for going out there. He gave me $10, and I gave him back $1. He gave me $9. The man who took me out in the truck went to the boiler and used the tube expander (Government's Exhibit No. 22 for Identification).

The still pit was lighted by gasoline lights with the pump. I only see one man in the courtroom whom I saw at the time I went out to the still.

(Whereupon the witness indicated the Defendant Connley.)

THE WITNESS: I first saw this man there at the still; he was there.

(Counsel for all of the defendants announced they did not desire to cross-examine this witness.)

(Testimony of Roland A. Godfrey.)

ROLAND A. GODFREY,

a witness on behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: I reside in Los Angeles. I am a federal prohibition agent, and was such in the month of January, 1930. I made an examination of the mine located on Section 21, as shown on the drawing on the black board. I observed a pipeline leading into that mine. I made a very cursory examination of it. I climbed up on this sump, because at the time we arrived there the other three men and myself didn't know exactly the location of the still. I am referring to Mr. Peters, Mr. Rhodes and Mr. Noe. We climbed up on there, and I noted a connected pipeline coming out of this sump or mine shaft. I followed the pipe possibly 100 yards, not over that, away from the mine, and then I left the pipeline and went out further in the sage brush where I could see around the edge of the hill. From the point where I observed the pipe in the mine to 100 feet away from the mine it was connected all in one piece.

CROSS EXAMINATION

BY MR. BELT.

THE WITNESS: The pipe was completely connected. There was no break in the line as far as I walked down following it that night. I don't know how far the pipe went down into the mine, because I didn't go down in. Coming away from the mine it was solidly connected, as far as I walked along it, which was possibly 100 yards, not to exceed 100 yards. I didn't walk clear up to the end of it. I didn't see any end to the pipeline at all. I

(Testimony of Charlie Hudson.)

saw the pipeline going down into the mine, and I followed that for a distance of possibly 200 or 250 feet toward the Bruno Ranch. Then I left the pipeline where I could see past the hole. The pipeline ran in a general direction. As far as any big bends are concerned, there were none, except to more or less conform to the contour of the ground. After the pipe comes out of the mine, I am not very well up on those directions, but I believe it is in general about an easterly direction. There was no abrupt change in the direction of the pipeline, and no open end to the pipe out of the mine. I didn't see any open end of the pipe. I didn't note any particular connection on the pipeline. I am familiar with pipe fittings just in a general manner. I know what a T or an L would be, but I didn't notice any of those. I saw no right angle bend in the pipe.

(Whereupon it was stipulated that the still viewed by the jury might be marked Government's Exhibit No. 23 for Identification.)

Whereupon Government's Exhibit No. 22 for identification was admitted in evidence as Government's Exhibit No. 22.

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a witness on behalf of the plaintiff, testified as follows:

CHARLIE HUDSON,

DIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: I live in Elsinore. I know Mr. Bruno and see him in the courtroom. In the latter part of 1929 he came down and got a drill from me, a seed

(Testimony of Albert Kruse.)

drill. He said he wanted the drill to drill in oats on his ranch out there.

CROSS EXAMINATION

BY MR. HERRON.

THE WITNESS: He came to my house on the Saturday before they found the still there, that is, the Saturday before the 21st. He came right after noon dinner and took the drill away about 12:30 or 1 o'clock.

REDIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: This drill belonged to Mr. Wagoner, and I had rented it temporarily. Mr. Wagoner and Mr. Bruno came up that morning, and I wasn't at home, and so Mr. Bruno came up and told me that Mr. Wagoner and him had been up, and he told him to get the drill, so I let him have it.

ALBERT KRUSE,

a witness on behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: I live at 130 North Avenue 20. I have worked for Mr. Kelly, of the Kelly Boiler Works of this city, for pretty near two years, and I last worked just the other day, and was laid off on account of he was short of finances, just yesterday, I think it was. I did mostly keeping up machinery, and stuff like that, and sometimes a little layout work—most of the layout work was done by the boilermaker, Pete, but sometimes I did that, and placing different things, like that, some-

(Testimony of Albert Kruse.)

times delivering—general work. There are so many people come in I don't believe I know personally a dozen names. As far as recalling the name "Connley" or "Walker" is concerned, I have heard them speak of it, but as far as knowing the name, I don't know. I was subpoenaed and taken down to the Bruno Ranch yesterday, and I seen the boiler base that I helped lay out, that is, that I put together for the welder to weld, but as far as knowing the man's name, I might know the man if I seen him. On the Bruno Ranch I observed parts of a boiler that were out in a field, that is, near the still. I recognized the base there thoroughly, and the boiler was simliar to the one that went out, but as far as any special mark on the boiler, I can't say that I recognized it. But I absolutely did recognize the base that I saw there. I had seen that base before yesterday in the Kelly yards, where we built it up. The welder was a good welder, but he didn't understand the placing of the material in place, and Mr. Kelly told me what he wanted, and I had to place the material of the base right where he wanted it, and the welder welded it. We had placed it, and it was done, and then the party came and had it changed. It was not like they wanted it, and Mr. Kelly had me change the base. The person that came there was a heavy, fleshy man. I don't know his age. If I am not mistaken, I would suggest he would be about 30, maybe 35, something like that. He was a large, heavy man, and he wore rather what you might call loose clothes—a pretty fair looking man. He talked absolutely to Kelly. He told him that he didn't want that base fixed that way, so the mortar would cover the rivets at the

(Testimony of Albert Kruse.)

bottom of the boiler, and for that reason he would have it changed, that is, he wanted it changed so the mortar would cover the rivets. You see the fire can't crack the rivets where there is mortar, because you loosen up your boiler, so the mortar was to keep the heat from striking the rivets, that is, I wanted the base covered with mortar and insulated to protect it from the fire. This man in my presence objected to the way in which I had secured this base, talking with Mr. Kelly, and gave his instructions as to how it should be placed, in my presence, to Mr. Kelly. When he talked about covering these rivets up with cement I wasn't more than 20 feet from him, and I had been working on that, and—at the time I forget what other work I was doing—and he talked with Mr. Kelly, and I heard him make the remark that that wasn't the way he wanted it, and Mr. Kelly right after that came up and told me we had to change that, and then he showed me where he wanted it changed. The man had gone then. I last saw Mr. Kelly yesterday morning. It was before work. I went up to his shop to see about getting settled up, and he was in the shop.

THE COURT I don't see why this court shouldn't order that man Kelly in here again.

MR. OHANNESIAN: Your Honor, in the absence of the jury, I may have something to state on that.

THE COURT: You may step out a few minutes, gentlemen. We will see about this.

(The jury retired from the courtroom.)

Exception No. 34.

MR. OHANNESIAN: Your Honor, yesterday some person came up to my office who was well acquainted with Mr. Kelly and, in fact, he has worked at Mr. Kelly's

(Testimony of Albert Kruse.)

place—not this gentleman—and he stated that after Mr. Kelly had gone back to his place of business he said, "Well, they didn't get anything out of me; I couldn't read or see, and they wanted to give me some glasses to read with, and I had my glasses in my pocket all the time. They didn't get anything out of me."

THE COURT: I was very well satisfied that Mr. Kelly was determined the other day not to make a witness in this case if he could help it.

MR. OHANNESIAN: I didn't want to bring this matter up and would not have unless it was suggested by the court, because I thought it might in some way interfere with the due progress of this case, and would take it up at a later date. But I am willing to abide by whatever ruling your Honor wants to make. I do think Mr. Kelly ought to be brought before this court.

THE COURT: Well, when it comes to the question of identification, certainly Kelly ought to be able to help, better than this man. Would you know the man you saw talking with Kelly again, if you saw him?

THE WITNESS: Well, I probably would, although there is lots of people coming in there and the chances are I may and the chances are I may not.

THE COURT: He had his hat on?

THE WITNESS: I saw the man, as far as that is concerned, with his hat off and on.

MR. OHANNESIAN: I think I can clear it up; I don't know. It is very unfortunate the witness is not here. I asked this man how many times this man objected to the way in which the base was being made and whether or not the same individual had been there be-

(Testimony of Albert Kruse.)

fore, referring to the defendant, and this man said he had been there several times. I think if questioned he will say the same individual was there on several occasions. I had not completed my examination of this witness.

THE COURT: Telephone Mr. Kelly and tell him he has to come up without further delay. We will not hold this court up.

MR. GRAHAM: May I suggest, Your Honor, we want to object to counsel making any statements in front of the witness before questioning him.

THE COURT: Counsel undoubtedly has talked to this witness before.

MR. OHANNESIAN: I personally have.

MR. GRAHAM: Exception. We move that the statement of counsel be stricken, the statement as to what he expected to prove by this witness.

THE COURT: There is no jury here.

MR. OHANNESIAN: Let it go out. I have no objection.

THE COURT: You may bring the jury back again. Who did Mr. Kelly make this boast to, that he would put it over on the court? You have his name, have you?

MR. OHANNESIAN: Yes, I have. I have his name. We will have him here.

MR. GRAHAM: If the court please, if we are going into this matter of Mr. Kelly, I think it should be done in the absence of this witness.

THE COURT: Why?

(Testimony of Albert Kruse.)

MR. GRAHAM: Because it will give the witness the idea if he does not identify some one he will get himself in wrong with the court.

THE COURT: Oh, no, no. That is not a valid objection.

MR. GRAHAM: I want the record to show we take an exception to the procedure.

THE COURT: Very well. You may have your exception.

(The jury returned to the courtroom.)

THE WITNESS: I have seen the gentleman whom I have described, and who questioned the manner in which the base was built, there at the Kelly Boiler Works two or three times. I am sure they drove in there with a Ford sedan, and I seen them in the office two or three different times, talking with Mr. Kelly and the bookkeeper, Fred Ranney. This man was standing when he was talking to Mr. Kelly about the base. I have seen him sitting down in the office I guess a couple or three times, maybe more, and I have seen him walk from his car to the office. I never noticed him sitting down inside with his hat on. I saw him there, oh, I don't know—that must have been three or four different times; anyway I seen him two or three times in the office, and I seen him that time when he came down and spoke to Mr. Kelly about the base. I didn't pay any particular attention. From the witness stand it appears to me like this man between the two gentlemen in gray (indicating the defendant Connley).

(Testimony of Albert Kruse.)

CROSS EXAMINATION

BY MR. BELT.

THE WITNESS: I have testified that I overheard several conversations between the gentleman that was directing the erection of the base to Mr. Kelly. He didn't have either a high tenor or deep bass voice, but just ordinarily speaking, I think his voice was something like mine, not quite as hoarse as mine is.

Exception No. 35.

MR. BELT: Did he have an impediment in his speech?

MR. OHANNESIAN: Just a minute. We object to that as not proper cross-examination of this witness, your Honor.

THE COURT: Well, it is cross-examination on identification.

MR. OHANNESIAN: We didn't go into the question of his voice.

THE COURT: Wait a minute. I sustain the objection.

MR. BELT: Exception.

THE COURT: You may recall this witness, if you need him on this point.

(At the conclusion of the testimony of this witness the following proceedings were had:)

THE COURT: You are excused. We may call you back by telephone, if you will leave your telephone address, but probably it will not be necessary.

MR. OHANNESIAN: Do I understand the defense do not want him to remain? If they do, we will have him stay.

(Testimony of Albert Kruse.)

MR. GRAHAM: No.

MR. OHANNESIAN: We don't want it said afterward that we let him go before they were through with him.

THE COURT: The court has offered the defense the opportunity to call this man back; if they want him to remain, that is for them to say right now.

MR. GRAHAM: Does your Honor mean that he will call him back for further cross-examination?

THE COURT: No. The court may deem it necessary to call him back for further direct examination. I don't know yet.

MR. GRAHAM. That is all right. If we call him back, we won't have to put him on as our witness, will we?

THE COURT: You will have to put him on as your witness. You have exhausted your cross examination. You said you were through.

MR. GRAHAM: But on the one point as to which we questioned him as to the character of this man's voice, your Honor said he would not be permitted to testify as to that now, but we thought we might recall him later.

THE COURT: I thought possibly you might lay the foundation in your defense for making him your witness. That is what we had in mind. This voice proposition is yours, not the government's.

THE WITNESS: As to the time of this transaction, it has been quite a while ago; as far as remembering dates, I don't remember, but I should judge it has been quite a while ago, several months ago, something

(Testimony of Albert Kruse.)

like that, two or three months. It was more in the spring than in the winter or summertime; something like that; I don't recall exactly.

Exception No. 36.

MR. BELT: If your Honor please, at this time I am going to make a motion to have the whole of the testimony of this witness taken after the jury was excused stricken from the record.

THE COURT: Taken since the jury came back, you mean?

MR. BELT: While the jury was absent.

THE COURT: What he said while the jury was out is not a part of the record. In fact, he said very little, except to answer some questions as to a matter of which the jury can have no knowledge, and has no knowledge.

MR. OHANNESIAN: And I want the record to show that there was no testimony taken outside of the presence of the jury.

THE COURT: He offered no testimony for the record, while the jury was absent.

MR. GRAHAM: Here is the motion. It is a motion to strike out the testimony of the witness, given after the jury was excused and after they returned, on account of what happened in the presence of this witness in the absence of the jury.

THE COURT: Overruled. Save your exception.

MR. GRAHAM: I didn't want to state what happened, because I don't think that would be proper.

THE COURT: The court rules that nothing happened to the prejudice of the defendants.

MR. HERRON: An exception.

(Testimony of Charles Kruse.)

MR. GRAHAM: An exception.

THE COURT: The court is sitting here not as a mere umpire, but with the duty of finding what the facts are, and we have the right to send the jury out and make these inquiries, and we propose to do it.

MR. HERRON: An exception.

THE COURT: Proceed.

—o—

CHARLES KRUSE,

a witness on behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: I know where the Kelly Boiler Works is located. I have worked there, and I know Mr. Kelly. I don't recognize anyone by the name of Connley that I know of. I was working at the Kelly Boiler Works in the month of January of this year. I saw two men there that I see here. In connection with my statement that I saw one man, it is the gentleman sitting next to the lady with the brown straw hat, the lady with the scarf on, the one with his hand to his mouth, (indicating the defendant known as Connley). I saw the defendant Connley more than once. I would say I saw him at least twice, because I saw him two different places. At that time I was listed on the books of the Kelly Boiler Works as a boiler helper. I did a little bit of everything. The first time I recall having seen Connley at the Kelly Boiler Works was just a little while after Christmas. I don't know the day exactly. A rush order came in to get some flues out, anneal some

(Testimony of Charles Kruse.)

2-inch flues, and Mr. Kelly had the flues gotten out of the racks and annealed, had them tempered on the ends, the temper taken out, so they could be rolled down. There was present at that time Henry, the blacksmith, who was there, a couple of mechanics, Pete Valero, and the welder, named Albert Aguilla. I was there, and Lou Taylor was there, and my brother was there, and Mr. Kelly was there, and that gentleman referred to as Mr. Connley was there at that time. Mr. Kelly had the flues cut to the proper length, and then put in the furnace. He has a retort furnace that he keeps them in and anneals them. And he came back later, and the other gentleman came with the truck, and Mr. Kelly had them load the flues in the truck. The other gentleman was the young man sitting to the left of the lady (indicating the defendant Bruno), the one with the small mustache there. They loaded the flues on the truck, and I went on about my business. I saw them there. Perfecto Valero had been working on a boiler in the shed, but he went away with those gentlemen in the afternoon; the hour I don't exactly recall. I think the tubings I have referred to were 2-inch tubings. I don't know how many there were, but I don't think very many, perhaps a dozen.

CROSS EXAMINATION

BY MR. HERRON.

THE WITNESS: This incident occurred along the 1st of January of this year, in and around the yard and the plant. I believe there was a driver that came with the truck to get the flues, a Mexican, I believe it was that was doing the driving, and I am not positive,

(Testimony of Charles Kruse.)

but I think there was a man that had a leather coat on. Connley was there, but he wasn't in the truck. It is very hard to say how many men I saw out of the truck, because there was quite a number of people came in there, and the machines there at the same time—that I couldn't connect them up together; there might have been different machines. They might not have come all together. I took it for granted that this other gentleman was with Mr. Connley, because generally when you see two people standing around together, when they are supervising a specific job, why, you take it for granted that they are together. I have seen Connley twice, perhaps three times, but I couldn't swear that I had ever seen the other man before that day. I do not know, but I believe I have seen the other man once since, at Kelly's, where we worked, when they brought back some skids that they used and an iron saw horse and some machinery that they had taken away. I was sitting here in the courtroom during the time Mr. Kelly testified. This man, Mr. Bruno, was not pointed out to me by anyone in the courtroom. I feel reasonably certain that this is the man, because he reminds me a good deal of one of my former employers. It was less than four months ago that I saw him. I did not talk with him. I couldn't say that I heard him talk. They were quite some time off and on around the plant, altogether, I should judge an hour and a half. All I know, as fixing the date when I saw this man, was that it was when they got some flues. I don't keep a memorandum of anything like that, but there were things that took place at that time or a few days afterwards that made

(Testimony of Thomas W. Noe.)

me recall. This was stamped on my memory along in the 1st of January, 1930. I couldn't say whether there would be anything in the books, that would enable me to fix the time, and I don't know anything about the purchase of the tubes, but I know when they were put on the truck and taken away; in other words, I can't recall just what date it was, but I do know it was some time in the first of January, 1930, and I know it was the same time that Valero went out to repair a boiler for Walker; it was that date. I think it was the first of some month—I am not positive, but it was the day that Mr. Valero went out on the truck with tubing.

—o—

THOMAS W. NOE,

a witness on behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: I am an investigator, have been one since 1926. I know where the Bruno Ranch is located. I had occasion to go there. I went out there, I believe, on January 21st. The officers that had made the arrest called our office, and we left immediately and went to the ranch. I went down to the pit where the still is located and made a very casual investigation there. I observed lamps there. There were three gasoline lamps that pumped up air, had mantles on them. I was at the still all night, and I used one of the lights going from the house, from the Bruno Ranch house down to the still; I lit the lamp myself and carried it on some

(Testimony of Thomas W. Noe.)

seven or eight trips I made from the house down to the still. While I was there I observed a number of large galvanized tanks. There were three. Two of them had something in them. It was alcohol. I know it was alcohol because I drew the alcohol out of the pipes and filled up 148 five-gallon cans of alcohol. We loaded it onto a truck and brought it to Los Angeles and put it in the warehouse.

Examining Government's Exhibit consisting of two tins, they are the same tins that we loaded onto the truck. These 146 cans of alcohol are still in the government warehouse. The mash was poisoned and left there. We brought out a five-gallon can for analysis.

CROSS EXAMINATION

BY MR. BELT.

THE WITNESS: Referring to these gasoline lamps, I had occasion to light one of them in the pit. It had two mantles on. With reference to the particular one that I carried, there was only one mantle on it that would burn. The other mantle I couldn't get to burn but the one mantle on the one I carried burned very nicely. I lighted this down in the pit, right by the side of the still, I would say probably six feet from the still. It made a very bright light. It couldn't light the whole room on account of the large wooden vats in it. It lit all of the room in which there was any space to be lighted. Assuming that I stood 15 feet away from it, my face would be visible to you very readily in that light. I carried that lamp in my hand on several different occasions.

(Testimony of Thomas W. Noe.)

(Whereupon the plaintiff offered in evidence 146 tins of alcohol, and also something in the neighborhood of 50 gallons of mash.)

(Whereupon the plaintiff announced that it rested.)

(Whereupon the jury retired while the following proceedings were had.)

Exception No. 37.

MR. BELT: At this time, your Honor, the defendant Pete Connley moves the court to direct the jury to return a verdict for him on the following grounds:

First, no offense against the United States is charged in any of the counts in the indictment.

Second, the evidence adduced at the trial fails to prove the conspiracy charged in count number one of the indictment.

Third, the evidence adduced at the trial fails to prove that the defendant was at any time connected with the conspiracy charged in the first count in the indictment.

Fourth, the evidence adduced fails to prove that the defendant was guilty in the manner and form as charged in count one in the indictment.

Fifth, the evidence adduced fails to prove that the defendant has been guilty in the manner and form charged in count two of the indictment, three, four, five and six.

THE COURT: Motion overruled.

MR. BELT: Exception.

Exception No. .....

MR. BELT: At this time, your Honor, the defendant Herman Quirin moves the court to direct the jury to return a verdict for him on the following grounds:

(Testimony of Thomas W. Noe.)

First, no offense was committed against the United States, as charged in any of the counts in the indictment.

Second, the evidence adduced at the trial fails to prove the conspiracy charged in count number one in the indictment.

Third, the evidence adduced at the trial fails to prove that the defendant was at any time connected with the conspiracy charged in the first count in the indictment.

Fourth, the evidence adduced at the trial fails to prove that the defendant was guilty in the manner and form charged in count one of the indictment.

Fifth, the evidence adduced fails to prove that the defendant was guilty in the manner and form as charged in count two in the indictment, three, four, five and six.

THE COURT: The motion is overruled.

MR. BELT: Exception.

(Whereupon the jury returned to court.)

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TESTIMONY ON BEHALF OF THE DEFENDANTS.

(Whereupon it was stipulated by and between counsel for the plaintiff and counsel for each of the defendants that a man named Bryant, if called to the witness stand on behalf of the defendant Nick Bruno, would testify that during the entire month of December, 1929, he was with the defendant Bruno; and that Bruno and he, Bryant, were attending Mr. Bruno's goats in Cottonwood Canyon some ten miles from the Bruno ranch; that Mr. Bruno was there continuously with him, Bryant, during that entire month and did not leave that ranch

(Testimony of Joe Verda.)

for any purpose and did not come to Los Angeles for the purpose of visiting the Kelly Boiler Works or for any other purpose.)

——o——

JOE VERDA,

one of the defendants, testified in his own behalf as follows:

DIRECT EXAMINATION

BY MR. GRAHAM.

THE WITNESS: I am one of the defendants in this case. I live with one friend of mine down by Lincoln Park. I am 58 years old. I do all kinds of farm work. I know a man named Frank Romero. I first met him about five days after they got me, that is, before they arrested me. I met him on Second and Main Streets in Los Angeles in the afternoon. I was just looking around. I looked for a job. I was out of a job at that time. I never had no job and I looked for work then. There were a lot of people there at an employment agency, for I was looking for work. I was right there on the sidewalk; and he told me, "Do you do any farmer work? You can do farmer work?" I said, "Yes." He said, "I can get you a job." I said, "I can't do any heavy work. I have got to have light job." He says, "All right. We are giving you a light job. I will put you on a ranch and you can keep a ranch and tend to the mules." He said he would pay me $30 a month and board. I accepted the job. He told me if I wanted a job he would be at the same place the next afternoon, which was Friday afternoon about 1 o'clock.

(Testimony of Joe Verda.)

I went there at 1 o'clock the next afternoon, which was Friday. The first time I saw him was Thursday. He told me, if I wanted the job, he would pass by here Friday afternoon and pick me up. I met him there Friday afternoon and he took me on the machine. He buy some groceries and take me in the machine and take me over to the place where I was arrested. We got there about 4 or 5 o'clock the afternoon of the Friday before I was arrested. I did not do any work that evening. There was no one else there when I got there. He showed me the room in the house and said he had a bed in there. He told me to sleep in the dining room and told me I sleep until somebody come to the ranch and you help him. He said somebody come to plant barley and oats and you help him and do what the man tells you. The man brought his team over there about 5 o'clock. He came there and brought a drill in there and go away, that is, a grain drill with which to plant grain. It was a big drill. He brought it in about 4 or 5 o'clock Saturday afternoon. I see that man the next morning again and I had the mules ready to work as he had told me. That was Sunday morning. That man said he was Nick Bruno. He was the defendant Nick Bruno. He was the man that brought the grain drill there. Mr. Bruno started to work with the mules and the drill, and I have a hoe and I pulled out all of the brush in front of the grain drill so the drill could run smoothly. We worked all day Sunday until about 5 o'clock. Bruno left the drill there and went away. He said the mules were too poor to do the work. I sleep in the same bed in the dining room. And the next

(Testimony of Joe Verda.)

morning Mr. Bruno came again and brought a team of horses with him. That was Monday morning. Mr. Bruno and I worked the same way Monday as we had on Sunday, except that we used the horses instead of the mules. When we started to plant with this grain drill we started over there by the front gate. On Monday afternoon Mr. Bruno and I ran the grain drill around the haystack. Mr. Bruno and I were both around there at the same time. When we got to working around the haystack we saw the holes around that haystack. It made a stink, but we could see something down in the hole. There was a boiler like water. That was the first time I had been near that haystack. Up to that time I did not know what was under the haystack. I did not know there was anything under the haystack. We did not finish with the planting Monday afternoon. We had a piece left. We planted the grain on the piece that was left the next day. When Mr. Bruno and I saw this hole under the haystack and saw what was in it Mr. Romero came at that time. I saw Mr. Bruno get into a fight with him; get into an argument. After this conversation between Bruno and Romero we went on doing the work on the ranch and planting grain until 5 o'clock. The next morning, which was Tuesday morning, we finished the little patch which was left over from the night before, that is, we finished planting the grain. As soon as we finished Mr. Bruno took the drill and the team of horses and went away. That was about 11 o'clock in the morning of the day I was arrested. I was arrested about 2 o'clock. Mr. Romero was there that day. He was there the day before and

(Testimony of Joe Verda.)

the next day I see him again. After Mr. Bruno and I saw the still under the haystack on Monday afternoon I saw Nick Bruno and Romero talking together; and Romero stayed there after Mr. Bruno go away. He stay there, him and another man, him and one or two men. After Mr. Bruno went away I cooked my soup and then I went to bed. I went to bed right after I ate my soup. There was nobody in the house after I went to bed. I hear somebody talk outside the house, Romero and a couple of more men. I never went out there to see what they do. I didn't go out because I was kind of afraid and I don't want to be hurt. When I see they are there I don't want to be in trouble. I think I had better stay in bed. I don't want to be in trouble. The next day after Bruno left with the grain drill I saw about four men around the place in the morning. I saw Mr. Romero there. The only other man that I saw there whom I know is that fat man over there (indicating the defendant Connley.) He never told me his name. He gave the officers the name of George Walker. Romero and these other men came there Tuesday morning. I saw a big truck bring some lumber there. He took the lumber over there, back over there where he was going to make a foundation for the tank there to the reservoir. George Walker, the fat man, said that, he and Romero. They moved lumber in there and started to work. I saw these two federal officers when they drove into the place in their car. I saw them come in inside of the fence. At that time I was at the reservoir talking to Romero. Mr. Romero said, "Go over there and stop that man and see who it

(Testimony of Joe Verda.)

is." I walked over to them but he no stop. He go on to the house. I took my handkerchief out of my pocket like this and say, "Stop." But they never stopped. They went around me and they go on to the house. I follow him back to the house. When they got up to the house they got out of the machine and they showed me the badge and says, "I am an officer," and shook hands with me, and says, "We are officers and want to search the house." I said, "All right. Go ahead and do it." They searched the house and they showed me a big copper can that was in court the other day; but I never saw it there before. He found it in a little room on the other side of where I sleep; not in the room I slept in. I had never been in that room. After they found that can the officer told me, "Come on and follow us." He said, "We want the rest of the things." He said, "Come on. Follow us. We want to know some more things." I don't want to go with him because I get in trouble. I follow him anyhow. I go along. I never leave him alone. I told him, "Leave me alone. I got nothing to do with this thing." One of the officers and the fat man went down under the haystack where the still was. They stayed there about 5 minutes; I don't know just how long. When they came out we was on top and we go back in the house again. I saw one of these other men that had been there at Mr. Romero's; and he take me over there and one man go away. One man take the truck. He go away. He drive the truck away when he come—when he see the officers. When the officers was in the house searching the house he go away with the truck and the other men

(Testimony of Joe Verda.)

go away, too. They went in the field, across the field. When we came up with the officers away from the place where the still was he took us back to the house. I told the officers, "Let me go." I am kind of scared, you know. I don't like this kind of business. I don't know anything about it. Finally one of the officers left and went away for a while and one stayed there with me and the fat man. The fat man told me to go over there to shut the pump while the officer was gone. When I went down to shut off the pump I saw those men that had run away. They were on the hill, on the side of the hill. He do like this and I do like this to him (illustrating). He waved at me and I waved back at him. The pump that I went down to shut off was a little pump that is about 200 feet from the house, back of the house between the water reservoir and the front gate. When I finished shutting off the pump I saw two of these men on the hill. When they waved at me I waved back to them. I waved my hand because he do it to me like that. He told me "Good-bye," and I told him "Good-bye." That is all I meant. He waved "Good-bye" to me and I waved "Good-bye" to him. I never saw him again after that.

CROSS EXAMINATION

BY MR OHANNESIAN.

THE WITNESS: I was glad to see them go. The first time I went out to the ranch was about 1 o'clock on Friday. I got there about 4 or 5 o'clock. I think there was a little more sun at that time, about one hour or so, half an hour. When we went out Romero and I took some groceries out. We took a good box full. He did

(Testimony of Joe Verda.)

not tell me there would be some other men there that he wanted me to cook for. I did my own cooking but did not cook for anybody else. I saw that long table in the dining room. There were several chairs there, too, two or three rocking chairs. There was nobody else in this dining room besides myself. Nobody went in there while I was there. That one hour I was there that first day I did nothing except to look around. It was a new place for me and I looked around. I seen a haystack over there and I seen the mules in there. I saw a large haystack. It was covered over with tin. I see a fence around it. That is the first afternoon I was there. I did not notice that there were two fences, one nearer the stack and one farther away. I no pay attention. I see one big fence in there but I don't see the other. I saw some things that night up there to one side of the stack but I don't know if it is a boiler or not. I no go there at all. There was nobody there at all that first afternoon. There was nobody there watching the haystack and all that. When we got there Romero no stay long. He stay about half an hour and he go away. When he went away he say to me he gived to me $3, and he say, "If you ain't got enough to eat with this, you will try to buy some." I did not ask him, "What is this haystack you got over here?" The next morning I get up about half past six. When I first got up I did nothing except to get breakfast for myself. Then I went outside and looked around again. I saw this haystack and a pipe to the right there down in the hole. The Bruno house is on the hillside, a little high, and the haystack is down below about 200 feet from the Bruno house. But I saw it again the next morning. There

(Testimony of Joe Verda.)

was nobody around and I didn't know what it was and I didn't care what it was. I stay there until noon all alone. I did not go out there at noon to see what this haystack was. I didn't go inside of the fence to see what was down there. It didn't interest me at all. There was nobody watching that still, which happened to be a still and a haystack and the alcohol and everything, while I was there. The afternoon that I went out there and the following day there was nobody there but me. I was there all alone. It didn't interest me to go and see what that haystack was. Romero don't tell me nothing. He didn't tell me nothing at all. "If you want a mule—" I say, "Why the haystack is?" I asked him that the night when I got there. He says, "None of your business. That is my business." I took it for granted it was none of my business and that it was his business. I didn't go there. The reason I didn't go there the afternoon I got there was because I was afraid to go out there from what Romero told me. The next morning I didn't go around there at all because Romero tell me to keep away. He didn't tell me what was there at no time. He told me it was none of my business to go down to the haystack. Government's Exhibit No. 5, a picture, is the way that haystack looked the afternoon I went over there. I saw that. I looked here. I never looked here and there. That is what I say. He tell me to keep out of there and I keep out. That second day that I was out there I do nothing but pull some brush out of the field. I worked in the field near the Bruno house. They were there by the gate. He tell me he going to start a trench. I know where the mine hole is.

(Testimony of Joe Verda.)

This gate is between the mine hole and the Bruno house, a big fence and a gate. I bring some brush in there. I stay there all day. I work there all day. While I was working there near that gate I never seen anybody go up to the still, up to the haystack. I had my lunch at the Bruno house that day. I stay there. For lunch I take off all the time I want. Nobody there. I took my own time. I looked around to see what was going on. I didn't have much to do. I was not curious to know what was down under that haystack. That didn't bother me at all. I was told to keep away and I kept away. I didn't know what was up under that haystack. Nothing but hay. I can't tell you nothing because I never seen nothing before. I don't know. The second day after I was down there at the gate I came back for my lunch and I had plenty of time during the lunch hour. It didn't occur to me—I didn't think for a moment, "I wonder what is down under that haystack?" I didn't think about that. I didn't bother about it at all. I didn't care what was there. For all I know it might have been dynamite to blow up. Maybe that is why he told me to keep away; I don't know. I think it was. The second day I was there was Saturday. In the afternoon I continued to pull brush and work around, to pull some brush out. I pulled some brush out of the field. I had no special work. I had plenty of time in the afternoon. I looked around to see what was there. I saw the shed near the Bruno house where there was some big drums. I see when I feed the mules the hay. When I feed the mules I see some hay. I see all of the things in there. I saw the big gasoline drums there,

(Testimony of Joe Verda.)

lots of them. I also saw one or two barrels. I don't know what was in them. I touched one but it was empty. I did not see the feed tank up on the hill, that is, the tank right in front of the shed, buried in the ground. I never noticed that. I never went over to the mine at all. I see the mine last week when we all go but I never saw it before. I did not drive this team with this drill. This man named Nick Bruno drove the team. As the drill went back and forth planting the grain I followed it. I get in front of him and pull all of the brush. In working that drill I did not see Bruno run over a long iron pipe. I never seen any pipe. He never catch any pipe. He didn't go around any pipe, so he wouldn't catch it. He go right away to, and I never see it. He went west and north I think, both sides; and I didn't see him run into a pipeline. I was with him on Sunday the first day, the second day, Monday, until Tuesday. And Bruno didn't run into any pipeline. Romero did not tell me where he live. He tell me he lived in Los Angeles. I did not take his address. He tell me he is in Los Angeles but he no give me no address. He paid me for two days. If he would not come to pay me and I no get anything to eat, I go away. He paid me for two days. I asked him for his address but he did not give it to me. He says, "You don't need me." He says, "You can't find my house anyway." He didn't want me to know where he lived. That was when I first met him out there. But I drove all the way to Elsinore with him. On the way he tell me what kind of business he was in. He said, "I am going to plant some alfalfa on the ranch. You

(Testimony of Joe Verda.)

are going to work with me." And he no plant no more alfalfa. He planted grain. I did not see anybody working down there around the haystack on the third day I was there. I did not see a big hole in front of the haystack such as is shown on Government's Exhibit No. 8. I did not see anybody going in and out of the ground. If anybody had gone into the hole while I was by the house, I would see him. During all of the time I was there, the four or five days, I saw nobody working by the stack. I would go to bed about half past seven. There was nobody in the house at half past seven. I did not see anybody going down to the haystack. I did not see anybody come in with trucks and haul anything out. A truck with some lumber was there. That is the only truck I seen. I don't know whether anybody came there at night. I no hear any noises. I heard a noise Monday night when Romero was in there with two more men. I heard some noise outside. From the time I went out there Friday up to Tuesday I did not see anybody working around the haystack either day or night. During this time no one slept in the house but me and no one ate in the house but me.

When the officers went down there by the still I went down by the still. I never go down in the hole. I went along with the officers. I no want to go. He tell me to go along. Up to the time the officers took me there I hadn't gone there. The reason I kept away is because Romero tell me to keep away. I got a scare. I thought there was something wrong down there. I never tell anybody, "Now, I think there is something wrong down there at the haystack." Nobody was with me. There

(Testimony of Joe Verda.)

was no one to tell. I did not drive over to the neighbors at all. No neighbors come there at all. I saw Bruno the first time when he brought the drill in there. I did not tell Bruno, "Now Romero told me to keep away from the haystack." Bruno no come by the house. He bring the drill. He bring the drill for planting the grain. He put it inside the gate in the field and he came in the morning again. In the morning I did not tell Bruno, "Romero told me to keep away from the haystack." Of course, he starts planting on the other end. Nick was on the other side of the house from the haystack and I never saw the haystack. No one else came there to plant grain besides Bruno. He is the only man that planted the grain. Mr. Bruno put in the grain between the Bruno house and the gate and also the grain in between the Bruno house and the still. I saw him use the drill on the field in front of the haystack, too, clear up to the fence. after he had done that I told him this Romero says, "No go by the haystack." He says, "What is the matter with it?" I said, "I don't know what is the matter." He go over to look in the hole and me go over to look at it. as soon as I plant the grain inside of the fence, me and Bruno go and look at it and me see what they have in there. That is the third day after I got there on Monday, Monday afternoon. We no go in the hole. We looked down into this opening here on top. We didn't go down into the hole because we kind of afraid and we wanted to get out as soon as we can. I seen water. I see some water boiling there. It wasn't hot. I didn't feel any heat there. I see the boiler there. I saw water boiling. I could smell it, too. There was no stack in

(Testimony of Joe Verda.)

there at all. I never see it. I didn't look at all the openings that were around that haystack.

Exception No. 38.

Q BY MR. OHANNESIAN: Did you go around there where the stack is, the boiler stack, the one that counsel here called attention to? Did you go around where that big opening was where there was a stack sticking up almost out of the ground? Did you see that stack right over the boiler?

A I don't see no stack in there at all.

Q You never saw it. Did you look at all the openings that were around that haystack?

A I never see it.

Q You weren't interested, were you? You didn't want to see it.

MR. GRAHAM: We ask that be stricken out and assign that as prejudicial error.

MR. OHANNESIAN: We withdraw the remark.

MR. GRAHAM: And especially in view of the fact the government's own witnesses testified that stack wasn't exposed at the time of the raid.

MR. OHANNESIAN: There was no such evidence as that, and you know it. Why do you want to misstate the facts when you know better?

MR. GRAHAM: We assign that as error on the part of the United States Attorney and move it be stricken out.

THE COURT: The United States Attorney will withdraw the remarks.

THE WITNESS: I saw two openings there. The first opening that I looked through was here by the front.

(Testimony of Nick Bruno.)

by the gate. I see the water boiling it smelled bad. I think it was mash. I don't know what kind of mash it is. I don't know what mash is. I never saw a still before. I do not know what a still is. I do not know what that was under that haystack. I don't know what a still is used for. They make alcohol, I guess. I found that out because I heard them talking here. That is all. This is the first time I heard a still was used to manufacture liquor, when I was in court. Before I came into court I didn't hear of a still and didn't know what a still is used for. I am 58 years old. I never heard of a still and don't know what a still is used for.

NICK BRUNO,

one of the defendants, testified in his own behalf as follows:

DIRECT EXAMINATION

BY MR. HERRON.

THE WITNESS: My name is spelled in the Italian fashion, N-i-c-o-l-o B-r-u-n-o. During the month of July, 1929, I was living on my ranch, where the court and jury went, and where they examined that still. I am buying the ranch on contract. I first met a man by the name of Francisco Ramirez on the 20th of July, 1929. Prior to the time that I met him I was in the business of raising and milking flocks of goats. I was a goat herder. I got 1200 goats now. In June or July of 1929 I had 800. During the month of June, 1929, I rented a team of horses for hauling hay. The hay was all in a small pile, and we was hauling close to the house,

(Testimony of Nick Bruno.)

pressing. In other words, I was hauling hay from my field up to the baler to press it close to the house. I rented this team of horses from Mr. Amsbaw in June. In July Mr. Ramirez and two or three men came to my ranch and told me they want to rent your ranch; I told him, what are you going to do with my ranch, and he says, "We going to plant alfalfa here." He says, "We give you $400 a year." And he told me we not got enough water here to plant alfalfa. He says, "Well, we going to dig a hole by those trees, those willow trees, we are going to put a pump, and pump some water and irrigate the alfalfa." They told me they want the ranch for a year. Well, I says, "If you want it for more than a year, I will let you have it." That was the same day. They say, "We take him for a year, and then if we need them any more, we renew the lease." I agreed to rent it to them for the $400. They says, "We come back in a few days from now." They come back after a few days. The first time was July 20, 1929. The second time it was the 22nd or 23rd, two or three days after. I don't remember exactly. On that day they come down there and they says, "Well, we going to start digging the hole right away to get water, and we want to buy a team of mules from you and a scraper and a disc and harrow." I had a team of mules and a scraper and a disc on my farm before they came there. They bought the team of mules from me and the tools I had on the ranch; they paid me $65 for the team of mules, $25 for the scraper and the harrow and the disc, because they was old tools. At that time they also bought a ton and a half of hay which I had in the barn. The barn is that little gal-

(Testimony of Nick Bruno.)

vanized tin shed which has been there three years. I make it myself. I had a ton and a half of hay that I make on my ranch. I sell it for $30, a ton and a half, good hay. As I have said, in June I got a team of horses from a man by the name of Amsbaw to carry my hay in from the field to bale it. At a later time I rented another team from Amsbaw. After Frank Romero bought my team and the tools he says, "Well, this team can't do all the work. We want you to find another team. We don't know nobody here." He told me this mule too poor, can't do all the work. "I want you to find a team. I give you a man and you go with him, and you know somebody around here who got a team, and we rent." And he give me a man and I went to the city. We used to know this fellow here. I know him the first time, and he went down, this man need a team to deliver some dirt, and this man all right, I says, if you let him have it. And he let us have the team. He drive the team home, and I went home to the same ranch where the still later was. When I mentioned Ramirez I meant the man whom I also called Romero. It is the same man. "Ramirez" is a Spanish name, and "Romero" is Italian. I saw Ramirez there after I got the team. I got the man down there. He took the team and put them in the corral. That was in the afternoon about five or six o'clock when the team reached the ranch. Ramirez came to me about the 1st of August with respect to renting the ranch. Ramirez came down there, him and another two or three men. He says, "We got the lease ready. You go and sign the paper and I give you the money." Then I signed the paper and he gave me a

(Testimony of Nick Bruno.)

hundred dollars. I said, "Why do you give me a hundred dollars when the deal was for $400?" He says, "I never tell you I am going to give it all at once." He says, "I will give you $200. We will split the difference. Then I will not pay you for six months." Well, he says, "I give you another hundred on the 1st of February and another hundred on the 1st of May." Prior to the month of July I had a herd of goats on those premises. I moved it to the Sill place because I have had no feed and no water, and I move them every year down there, down to the Sill place. The people that own that place is the Tamascala Water Company, and the house in which the corral is—that belonged to Sill. I moved the goats over to the Sill place—it was the 1st of June. I signed the lease for my ranch on the 1st of August. They came down there, Frank Romero and two or three men, and they says, "We got the lease ready," and he says, "This guy here is a notary public," and he says, "He is a notary public here. We have got everything complete. You go sign it and I give you the money." My wife used to live there on the ranch with me. We left there to move over to the Sill Ranch the 1st of August. Before I left the Bruno Ranch Frank Romero told me, he says, "Bruno, we need some more hay over here. This hay no enough for feeding the mules. We want you to buy a couple more loads of hay." I used to know a fellow named Ed Funk, and I tell him, "You have got some hay to sell?" He says, "Yes. How many tons you want?" I said, "Eight or ten tons." And we make the deal for $10 a ton, and I sell him bales, Frank Romero, for $12 a ton. I charge $2 more for hauling

(Testimony of Nick Bruno.)

because I rent a truck from a fellow who used to buy my goat manure. It was a Moreland truck. I rented it from Joe Madrigal. I took it to Ed Funk, and I get two or three loads of hay, and then my place down there one load. Ed Funk came with me and help me. At the time Ed Funk came with me and helped me some work had been done around where the willows were. A couple of Mexican fellows and the boy was digging these trees out, these willow trees, where they said they was going to dig a hole to pump water. And I left the Bruno Ranch about the 1st of August and went to the Sill Ranch. We stay at the Sill Ranch until I move the goats on the 1st of June on the Sill place, and we stay there until August, about four-fifths of August; then we move to Cottonwood Canyon. There was better feed down there. That is what I do every year, change the goats two or three times a year. My own ranch is about ten or eleven miles from Cottonwood Canyon. To go from my ranch to Cottonwood you go from Elsinore to Murietta Hot Springs. After Romero gave me $200, the next time I saw him was when he come back and says, "Bruno, are you going to find me a drill?" That is the 17th or 18th of January. He told me he was going to seed the barley on the ranch. I said, "You tell me you are going to plant some alfalfa, and now you want to plant barley." He said, "I no got enough water yet." I says, "All right," and I went to a fellow close to Elsinore down there and I rent a drill. The fellow that owned the drill was Hudson. Mr. Hudson had a drill in his home. but he never used to own it. He was going to seed himself, and I went to Wagner's home. I buy hay from him this

(Testimony of Nick Bruno.)

year, too, and I used to know him well. I says, "Have you got the drill?" And he says, "Yes, I have got the drill, but another man use him." He says, "I don't know if he use him or not." He said, "You had better go to Charlie Hudson. If he is through with that drill, then maybe he give it to you." Then I went to Charlie Hudson and I tell him about it. He says, "Yes; I can't plant in my ranch." He says, "It is all wet. The dirt is not so good. I give it to you and you bring it along in two or three days." I says, "Sure." That was the 18th of January, on Saturday afternoon. That afternoon I took the drill down to my ranch and left it by the front gate. At the time I reached there it was late. I can do nothing the same day, and I left him inside the gate and went back to my ranch. I went back there the next morning and I saw Frank Romero and Verda. Frank Romero told Verda, "You do what this guy tells you. Help this guy put seeds." Then the old man had a shovel or something to cut those few brushes in the field, and he was cutting brush and I was seeds with the team. That was Sunday. I started about 7:30 in the morning and worked all day long. That day I seeds the front of the ranch. The next day I went to the other side of the ranch, and when I work on Sunday the mule was awful tired, you know, and I says, "I no think this mule going to pull the drill any more," and I went to this fellow who owns the drill and I rented the team—his team. After I rented his team I took them back and hitched them on the seeder and went to work with the horses. I worked all day Sunday. All day Monday I worked. On Monday I work the other side of the house, and when I started

(Testimony of Nick Bruno.)

the other side I saw this stack of hay down there. I did not go over there. I was about five or six hundred feet from there, seeds the barley, or whatever it was, and I saw this stack of hay and I says, "Well, they told me they were going to put in a pump," but they was digging a hole down here. They was putting in a pump, and now I see a stack of hay. There is something wrong here. I kept on putting on seeds until I reached close to the stack. When I reached the stack of hay I smelled something, and I says, "Something is wrong here," and I started to look close to the haystack, and there was a fence all around the haystack, a little fence right up close to the haystack, and I saw two or three holes there, and I looked and I saw some machinery, tanks, water and something in the tanks, a boiler—It had been something against the law. I says, "I never rent the ranch to do this kind of business. I rent the ranch to plant hay or alfalfa," and I says, "Now, you want to put me in trouble." I was mad. I don't know what to do. After I saw Frank Romero, and I leave the team close to the haystack, and he was coming around, and I says, "What is the idea to have this kind of business in my ranch?" He says, "Listen, you will get your rent. You better keep your mouth shut." He told me before, he makes me so scared I don't know what to do. "If you don't want to get into any trouble, keep your mouth shut. You will get your money." He says, "Go away and shut up, no tell nobody." The next morning I got up about 6 o'clock and went down about 7 o'clock, and I worked two or three hours, and I finished the seeds. I took the drill and the horses back to the owner. Then I went and buy

(Testimony of Nick Bruno.)

some goats close to Murietta Hot Springs, and the time I come back and reach Elsinore they arrested me in Elinore. That was the time I had 15 or 20 little goats. I went and bought them and was going to take them down to the corral. I had them in my little Ford truck. They told me, "You had better come back to the ranch, the federal officers want you." This officer here, he bring me on the Sill place. Another fellow drive my machine, and the officer was drive his car and I was with the officer. We went on the same place. We put my car in the garage, and the goats, and he brought me back on my ranch. About a couple of weeks after the officers got the place I move those goats back there on the Bruno ranch, the goats that are there at the present time, and I have been keeping them there since. I do not remember telling Officer Barber that Verda worked for me. I never hear nothing. I heard them tell the old man I am going to help this man here. The old man said they were going to have him help me with the seeds, and I said, "That is all right." I never went to a place in Los Angeles called the Kelly Boiler Works. I don't know where it is at, this place. All during the month of December, 1929, I was in Cottonwood Canyon. At that time I had 800 goats, and during that entire month I was there in that canyon. I was in that canyon for six months. I had a fellow in there helping me named Bill Bryant. I am very certain that at no time did I go with anyone to a place called the Kelly Boiler Works. Them months I used to go up and down the hills. We chased all the goats in the canyon, because it was cold, rain, and we had a hard time to drive the goats down to the corral.

(Testimony of Nick Bruno.)

I was living in that little cook wagon. There was no house there, and when we find no house we sleep in the cook wagon. In the month of December I did not go to Los Angeles at all. I see that copper utensil that sets in the back of the courtroom there. The first time I saw it was here in the courtroom. It was not in my house at the time I rented it to these people. It was not brought there before I left that place to go to the Sill Ranch, and I never saw it until I saw it in this courtroom. I never saw it in the house.

CROSS EXAMINATION

BY MR. OHANNESIAN.

THE WITNESS: I bought this property, I guess, about three years ago. At that time it had the old house on there. The old house is there now. That is marked "E" on the map. It is on a little knoll, on a little high ground, with a lot of trees around it. When I bought the ranch the house was there. When I bought the ranch the galvanized shed was not there. I make that myself. It cost me $145. Right back of my house there was an old water reservoir there. It is black on the inside. It is an old reservoir. There was no other improvement there at the time I bought it other than what I have stated. There was a little lumber shed there. The old man, and the man who used to sleep in there, an Indian fellow that I had the first year that I bought the goats, he used to sleep in the little house, and there was on the other side a big house. When I bought the ranch there was no house near the highway, the Elsinore-Perris road. That house was put up about a year and a half ago. A fellow named Herman lived there. I don't know

(Testimony of Nick Bruno.)

exactly his name. He is in the courtroom. He is that gentleman there, the bald headed fellow (indicating the defendant Herman Quirin). He built the house about a year and a half ago. That house was there complete in the month of July, 1929. I am referring to the house marked "B" on the Elsinore-Perris road. It is not a new house, built within the last four or five months, but there was about a couple of rooms built on there. He added new rooms to it when he came down there. Then after that he built another one, like a screen porch, on the same house; he connected with the same house. I guess that was last summer some time. I don't remember exactly. I know where that old mine pit is. I know that old mine a long time ago. I got the goats down there. I bought that ranch two years ago, but I have the goats down there before two years. I got the goat ranch about five or six years. I do not know when the mine pit was boarded in. When I know the mine there was nothing in the mine. The last time I saw the mine was when the jury come all down there, last Thursday. The last time I saw the mine before I went out there with the jury was before I come here in the court. I was there. I see that six years ago, five years ago, four years ago, three years ago, two years ago, I used to see that mine. I did not see who put the planks in there. I do not know when the planks were put in there. I never saw the work done in there. I do not know when the planks were put in there. I never saw that. I do not know where this man Romero lives. We come in Elsinore. He never gave me his address. I did not ask him for it. He told me he was going to live here on the ranch. I didn't get his address. The second time I saw

(Testimony of Nick Bruno.)

him was when he took the lease. He tried to give me a hundred dollars. Then I say, "No. You were going to give me my $400." And he give me $200, and when he give me the $200 he say, "I pay you for six months." And then after he said, "On the 1st of February I give you another $100 and on the 1st of May I give you another $100 and on the 1st of May I give you another $100." At that time he had moved on the ranch and was living on my ranch. Mr. Verda was not there at that time. When Mr. Verda moved in there I don't know whether Mr. Romero was living there or not. Mr. Romero told me he was living on my ranch. He says, "You are going to move your furniture out of here and I am going to bring mine in." I saw him on the ranch. He moved out a couple of days after he make the lease in August. Him and some other men come out there and moved in. The first time that he spoke to me about putting in alfalfa down there was the 20th of July, 1929. After I signed the paper I never went there to the ranch no more until I went down to take the drill, but I passed there on the highway. I was living on the Sill place, which is about five or six miles from my place. Mr. Romero did not come up to see me on the ranch. I did not go down to see him. He did not speak to me about drilling the place until the 18th of January in the morning. He come down to the other place and he says, "You are going to find the drill, and you go hunt the old man to seed the ranch." He came out to the Sill Ranch. He knew where I was living, I had told him when I moved the goats I was going to the Sill place. I told him that any time he wanted to see me to come over to the Sill

(Testimony of Nick Bruno.)

place. At that time a Mexican fellow was helping me tend to the goats. Sometimes I had time of my own to do other work, if I wanted to, and sometimes not. Sometimes when I got nothing to do I go work. When I no got anything to do I go work. When the time comes to help the goats I help the goats. After helping the goats—when the goats make the baby sometimes you need a couple of men to help, sometimes three men, and when we move away we have to build the corral, change the corral, and do all that work. I did not know that there was a pipeline from the mine down to the old reservoir. I found out there was a pipeline from the mine down to the old reservoir when all the jury came down there. That is the first time I knew of it. I don't know anything about a feed pipe from the gasoline store tank from the knoll down to the still. I never knew about that. I don't even know it right now. I never went down there. At the time I leased the property to Mr. Romero there was not a pipeline from the mine to the reservoir, and I knew nothing of it until this last Thursday when I went out there with the jury. Then all the jury was looking at the pipe, and that is the time I saw it. That is the first time I knew there was a pipe through my ranch. I was rather surprised, too. I used the drill in putting that grain in there. The drill was one you can ride on or you could walk. There was a seat there and you could ride on the seat. Sometimes I would ride and sometimes not, because it was heavy for a team. It took me a day and a half to drill the land between my house and the fence; that is, between my property and Quirin's Ranch; that is, between the reservoir and the

(Testimony of Nick Bruno.)

fence to the front gate. During the time I was drilling that sometimes I used to ride. When I used to feel tired I used to ride. I didn't find out there was a pipeline that went through that piece of ground. It took me Monday afternoon and until 11 o'clock Tuesday morning to drill the land between my house and where the still was located. I drilled all of that ground myself. That is, I planted it to grain. That is what I mean by drilling. The ground was not plowed up. I plowed that two years ago. I had hay again last year. It was not plowed at the time I drilled it. While I was drilling I never saw no pipeline. Commencing in front of the galvanized shed, down to the still, I didn't locate any pipeline. I didn't run into any with my drill. When I bought this last load of hay from Mr. Funk, altogether it was about 132 bales. One load I took in the barn, the galvanized barn, and the next load between the barn and the trees, between the house and the barn. That is about 150 or a couple of hundred feet from the place where the still is located now. It was between the house and the still. It was not inside the fence that is around the still. I never took no hay in there at all. I put one load in the barn and the other load between the house and the barn on the hill there with the trees all around. I put it between the barn and the house. I never see when they moved that hay. The first time I saw the hay again was when I saw it in the stack when I drilled, when I planted Monday in the afternoon. When I reached close to the haystack I saw it. There was no hay in the barn, just a few bales. On Monday in the afternoon was the first time I ever saw the haystack. I had not seen Romero just before I saw the haystack. I saw him on the 18th of January. I was sur-

(Testimony of Nick Bruno.)

prised when I saw the haystack down there, because they told me they are going to dig the hole there for the pump to pump water. I saw some men out there digging once. When I saw them the first day they had dug a hole about three or four feet, something like that. They had taken the trees out, too. There were some willow trees in there. And they told me, "I guess we get more water here, and we are going to dig here." When I saw it it was about seven or eight feet, something like that, square, and the trees had been moved away. Some trees were already down on one side of the hole. I never saw the hole any more. I saw it when I went to drill. I was never on the place from the time of the lease until I drilled. After I saw the haystack there on Monday I was surprised, because I saw the haystack there. I says, "What is this haystack doing over here? Maybe something is wrong." And I went more close. When I went more close I smelled something, and I said, "Huh! This looks funny to me here." Then I saw two or three holes, and I looked from the part of the hole and I saw some tanks and machines, like a factory, and I says, "That is what they do on my ranch." I says, "I never leased my ranch to do this kind of work." I knew Mr. Barber, the constable down there, or the chief of police, about a year ago. I did not go and tell him that I found a still on my ranch. I was afraid because that guy, he is awful tough. When I saw the pile of hay and these openings in the ground I never seen anything bubbling. When I looked down in the hole I saw the big wood tanks. I never went down the hole to see what they were. There was nobody there at the time except the old gentleman,

(Testimony of Nick Bruno.)

Joe Verda, was there within about ten or fifteen feet. Before anybody came there I did not go down and tell the constable or chief of police, Barber, that I had located what appeared to be a still on my ranch. I didn't tell him nothing about it Monday. Monday I was working down there. When I saw this haystack I looked at the hole and saw tanks and machinery there. In about an hour Frank Romero come down there. Before he came back I didn't inform anybody that I had located this still, because it was a short time after—a half an hour or an hour—I was awful afraid. I didn't know what to do. I didn't call up anybody. Before Romero came I didn't tell anybody I had looked into the still. I called the old man down there. I says, "Look what they got on my ranch." I didn't call up any officer and notify any officer. No officer was there. In driving my drill over that land where the iron pipe was I never hit no pipe at all with the drill.

REDIRECT EXAMINATION

BY MR. HERRON.

THE WITNESS: At the time that the court and the jury were examining a portion of those premises I went over there and tended to my goats. There wasn't any telephone on that ranch. I saw those pipelines out in the field when I went with the jury.

Exception No. 39.

(Whereupon, counsel for the defendants Peter Connley and Herman F. Quirin renewed his motion on behalf of each of said defendants for a directed verdict of not guilty as to each and every count of the indictment, upon the ground that the evidence was entirely insufficient to

(Testimony of Nick Bruno.)

warrant a verdict of guilty on any of the counts. The motion was overruled and exception taken as to both of said defendants.)

(Whereupon, counsel for the government presented his opening argument to the jury, and counsel for each defendant presented their arguments to the jury, and counsel for the government presented his closing argument on behalf of the plaintiff, during which the following proceedings took place:)

Exception No. 40.

MR. OHANNESIAN: Fred C. Amsbaw was the sixth man that was called and he testified that Nick Bruno rented his team, saying that he was going to do some excavating. Now, Bruno did not deny that. You will find that in volume 3, page 231, line 5; and also in Volume 3, page 238, lines 21 and 22.

MR. HERRON: Would you mind reading some of his other uses.

MR. OHANNESIAN: And the defendant was present when they said they were going to move dirt with the team on the place. When Bruno made this statement, the defendant Quirin was present. That is the testimony of Fred C. Amsbaw. You will find that in Volume 3, page 239, lines 16 to 22.

If Bruno was going to use this team solely for the purpose of drilling, because he was asked to do that by this so-called Romero, this unknown quantity, this unknown man, why would Herman Quirin pay for the team, if Herman Quirin was not in on this? If Bruno was telling the truth, that he merely took the team in order to drill, why did Herman Quirin pay for the team?

(Testimony of Nick Bruno.)

MR. HERRON: If the court please, I must interrupt. He is talking about the wrong team. That is the first team.

MR. OHANNESIAN: You are in the wrong team yourself.

MR. HERRON: No, I am not at all. We might as well take the evidence as it is.

THE COURT: There were two occasions of hiring the team.

MR. HERRON: Yes.

THE COURT: It is the first occasion you are talking about?

MR. OHANNESIAN: Yes, your Honor.

THE COURT: Before the hole was dug?

MR. HERRON: And not at the occasion of the seeding.

THE COURT: That was simply a mis-slip on Mr. Ohannesian's part.

MR HERRON: But a very unfortunate slip from the defendant's standpoint.

MR. OHANNESIAN: I was courteous enough not to interrupt you while you were making your argument.

MR. HERRON: I am courteous, but I have to do my duty, and I propose to do it.

THE COURT: Proceed.

MR. HERRON: But when you misquote the evidence—

MR. OHANNESIAN: Now, your Honor, I don't want to be charged with misquoting the evidence.

MR. HERRON: I do not mean to say he did it wilfully, but he has misquoted the evidence.

(Testimony of Nick Bruno.)

MR. OHANNESIAN: In order to pacify my learned friend, if he will turn to Volume 3, page 210, lines 19 to 23, he will know what I am talking about.

Later on Bruno came to Mr. Fred C. Amsbaw, the government's sixth witness, the latter part of July, 1929, and said that he had been digging a hole on his ranch and wanted to level the dirt, and that Quirin came with him and drove the team. Now, is there anything wrong about that?

MR. HERRON: Certainly not. You are reading from the record now.

MR. OHANNESIAN: Now, gentlemen, I say to you in July and August Bruno said, or told the witness, rather, government's witness Amsbaw, in the latter part of July or August, he had been digging a hole. Sometimes he called it a pit and sometimes a hole, and he wanted the team with which to level the dirt. What has that to do with drilling?

MR. HERRON: If the court please, it has nothing to do with it. They were months apart and counsel knows it—six months apart.

THE COURT: It seems to me you are unduly sensitive about this.

MR. HERRON: I am, your Honor; I am mighty sensitive.

THE COURT: Too sensitive.

MR. HERRON: I do not think so, your Honor. I think when the district attorney has his attention called to a vital error that I am sensitive when I insist—

MR. OHANNESIAN: I am not in error and I appeal to the jury. I gave the book and pages—

(Testimony of Nick Bruno.)

MR. HERRON: We assign that as additional error.

THE COURT: Proceed.

MR. HERRON: Exception, and we ask the court to withdraw the statement.

THE COURT: You may proceed.

MR. HERRON: Exception.

Exception No. 41.

MR. OHANNESIAN: Do you mean to say Bruno was telling the truth? The first time he knew there was a pipe line from the reservoir back of his old homestead home was the day after he was arrested, or at the time he was arrested, or, in fact, I believe he stated he never knew—well, whatever the facts are, you will remember, gentlemen. I say to you he is not telling the truth. I believe you have a right to deduce from the circumstantial evidence that appears that Bruno knew all the time that the line was there for a year and a half; he knew at one time it was timbered, and when he saw that it was not timbered it certainly must have aroused his interest. We would all be more or less interested. I have a right to make that deduction. We would want to see what operations were going on. It was right across the road.

MR. HERRON: There is no evidence Bruno ever went near that mine from the time he left the place until he came back.

THE COURT: It seems to me that is a very reasonable argument to make, that a man who rented a property of that size with the understanding that it was to be considerably revised at this place where these trees were, would be interested enough to go back within four

(Testimony of Nick Bruno.)

or five months and see how it was coming along. That is a reasonable argument.

MR. HERRON: The evidence is he did not, and we assign the remarks as prejudicial error, in view of the statement—

THE COURT: Just a moment, Mr. Herron.

MR. HERRON: And I request the court permit me to state my objection and then I will stop. I request that the court instruct the jury to disregard the remarks of the court and the remarks of the district attorney.

THE COURT: What of the district attorney's remarks do you wish removed?

MR. HERRON: His remarks which had the effect, or in effect argued to this jury that Mr. Bruno was back near the mine at any time during the time when it had been shown it had been timbered or the pipe line laid, as prejudicial error, not being supported by any testimony in the record, assign it as error, and ask the jury be instructed to disregard it; and ask that the remarks of the court in support thereof be likewise stricken and the jury instructed to disregard them.

THE COURT: If the record shows that Mr. Ohannesian said any such a thing as that, the court did not hear it. So far as the court's comment is concerned, Mr. Graham, with his very manifest impetuosity, which has disturbed this court for several days, has interrupted the court before the court finished his comment.

MR. HERRON: Exception.

THE COURT: Now, by the way of finishing what I was saying when we were interrupted: This is a proper argument, based upon Mr. Bruno's testimony, to

(Testimony of Nick Bruno.)

suggest that a man who had rented this property, as Mr. Bruno says he had rented it, with the understanding that his rentor would make some material changes and improvements on it, would not be likely to leave it alone for four or five months, but to visit it, to see how those improvements were coming on. While Mr. Bruno's testimony is uncontradicted, the fact that it is uncontradicted does not necessarily mean that it is irrevocably acceptable. It may be questioned respecting its reasonableness or its unreasonableness, and that is what we understand the district attorney is doing. The court has no judgment as to these facts, but we think the comment as argument is proper.

MR. HERRON: Exception.

THE COURT: And the jury will not understand, of course, that the court is endorsing the argument.

MR. HERRON: Exception.

Exception No. 42.

MR. OHANNESIAN: The next witness, as you will recall, was L. L. Mathews, the ninth witness for the government. Mr. L. L. Mathews stated he saw on Bruno's ranch quite a pile of dirt. Those are his exact words. He saw a pile of dirt and he asked Herman Quirin what it was, and he stated that they were building a cheese factory down there. And when he was cross-questioned about that, or cross-examined by Mr. Herron, he was informed that as fas as the witness observed it was a very serious statement and said in a serious way by the defendant Quirin.

Now, if it be a fact they were going to plant alfalfa and they were going to put in a water hole, they wouldn't

(Testimony of Nick Bruno.)

be putting it down there. This matter I will touch on later. They knew there were goats in the field there and they thought that was probably about as good an excuse as any—it was a silly excuse, a man having 800 goats is going to build a cheese factory, but you cannot expect a more sensible answer from anybody who is said to have violated the law.

MR. HERRON There is no evidence that Quirin had a herd of goats.

THE COURT: Neither is Mr. Ohannesian saying that.

MR. HERRON: He is saying it inferentially, if I understand him correctly.

THE COURT: You are too sensitive.

MR. HERRON: I am exceedingly sensitive, your Honor.

THE COURT: I wish you would take something for it.

MR. HERRON: He is not fairly quoting the testimony.

THE COURT: Proceed. Proceed.

MR. HERRON: Exception.

THE COURT: It is strange the district attorney cannot make his argument without these extraordinary objections.

MR. GRAHAM: If he did not misstate the evidence, we would not make these objections, your Honor.

THE COURT: He is not making any misstatements.

MR. GRAHAM: Exception.

THE COURT: The evidence is Mr. Quirin said—

MR. GRAHAM: We are not questioning what he said, your Honor.

(Testimony of Nick Bruno.)

THE COURT: Do you mean to say the district attorney said Quirin had the goats?

MR. HERRON: He said it inferentially. He is talking about the cheese factory, trying to bring in Quirin inferentially, if I get his modus operandi.

Exception No. 43.

MR. OHANNESIAN: Thank you. Now, gentlemen, there is a very singular situation. Here is a man that has no business and was out on the street and was looking for work, and he was stopped by someone. He did not know this fellow Romero. They called him Romero, and he was offered work, and he is taken out to the Bruno Ranch and said he could have employment at $30 a month, and all he had to do was to take care of the ranch, the mules, and help, according to Bruno's statement, of course, in drilling this field. There was an old man there, a man in the afternoon of his life, and it is too bad, a man nearly 60 years old, and he was foolish enough to permit himself to come in this holy temple of justice, raise his hand and add insult and injury to what is already done, and I say there is no ring of truth in his statements. And when Mr. Herron, the former district attorney of the United States, makes that statement, I am forced to say that is because he is employed by the defendants and he is obliged to defend them at any cost.

MR. HERRON: I assign that statement as prejudicial error. I am doing my duty here as honestly as I am able to do so, and as the United States Attorney is doing here.

THE COURT: I did not hear the statement. Will you read it, please, Mr. Reporter?

(Testimony of Nick Bruno.)

(Record read.)

MR. HERRON: I assign it as error, and I ask the Court to instruct the jury to disregard it. I assign that as the most deliberately unfair and indecent remark that I have ever heard made in a United States or any other court. I ask the court to admonish the jury to disregard it and to tell the district attorney to withdraw it and, failing that, I wish my exception.

MR. OHANNESIAN: I will withdraw the remark.

THE COURT: It would be better if the last remark were withdrawn.

MR. OHANNESIAN: I will withdraw that with apologies to Mr. Herron, providing he apologizes also in saying I have been misquoting the evidence.

MR. HERRON: I will not withdraw my statement in that regard.

MR. OHANNESIAN: Then I will withdraw my apology.

THE COURT: Proceed.

MR. HERRON: I assign that action of the United States Attorney as additional prejudicial error, and ask that the jury be instructed to disregard it.

THE COURT: What remark are you referring to?

MR. HERRON: Where he says he withdraws the apology and means what he originally said.

THE COURT: You want that withdrawn from the record?

MR. HERRON: I want the whole thing withdrawn as being deliberately unfair and indecent.

THE COURT: I think we can save time by disregarding this colloquy between these attorneys, and drop

(Testimony of Nick Bruno.)

the whole thing out of your mind. It is somewhat unfortunate. I think there has been unusual aggravation of Mr. Ohannesian and he naturally yielded to it, but I hope he will be permitted to continue with his argument and I hope he will not permit himself to be aggravated by these unnecessary and irritating interruptions in making some extravagant remarks hereafter.

MR. HERRON: We assign the remarks of the court as error, in that he says they are unnecessary and irritating objections.

MR. OHANNESIAN: At this time I wish to apologize to this Honorable Court for the apparent misconduct on my part. I am sorry I have allowed my temper to get the best of me.

THE COURT: Proceed.

MR. OHANNESIAN: I did not intend to do so and it was out of order. I hope you won't hold it against the defendants.

THE COURT: Proceed.

MR. OHANNESIAN: And let us forget that. If there is any particular feeling between Mark Herron and I I will be willing to take him out to dinner and the matter will all be forgotten.

MR. HERRON: As long as you don't ask to hold it against the defendants.

MR. OHANNESIAN: I don't ask you to hold it against the defendants, because they are not—

MR. HERRON: In other words, they are not to blame for their lawyer.

MR. OHANNESIAN: I think we can all agree on that.

(Testimony of Nick Bruno.)

THE COURT: Please be quiet.

MR. HERRON: Very well.

THE COURT: There is no occasion for you to say anything whatever. Proceed.

(Whereupon the court instructed the jury as follows:)

THE COURT: Gentlemen of the Jury, this case is planted not solely under the National Prohibition Act, but much more importantly under statutes of the United States which were passed long before it was conceived that this country would adopt the Prohibition Amendment, more than half a century ago, to protect the Internal Revenue. In one or two phases it invokes the National Prohibition Act. I say that because we were faced with just this sort of controversy over this same set of facts in 1915, before the resolution to amend the Constitution was introduced, as now, under statutes then existing, which still exist. The first count of the indictment is founded upon a statute, in fact, which was adopted as a part of the criminal law of the United States in 1789 and has existed unchanged since that time, the conspriracy statute.

The defendants pleaded not guilty, each one of them, when they were arraigned and thereupon each came under the provisions of our criminal practice, which one of the counsel has very eloquently and properly characterized as one of the honorable features of our Anglo-Saxon civilization. Counsel for the defense have offered to the court a requested charge, referring to that proposition which we are glad to give without any modification, except such connective discussion as may be necessary to classify them as they are offered as independent

propositions. So you are instructed that each of the defendants, at the time of the trial, is presumed to be innocent. He is not required to prove himself innocent nor is he required to put in any evidence at all upon that subject. In considering the testimony in this case, you must view it in the light of that presumption with which the law clothes a defendant. The law presumes the defendants innocent and that presumption abides with them throughout the trial of the case, until the evidence convinces you to the contrary beyond a reasonable doubt. You are instructed that in a criminal case such as this the burden of proof is upon the government and that burden remains upon the government throughout the case. It does not under any circumstances shift to the defendant so as to require him to prove his innocence. The burden of proof rests upon the prosecution to prove to the satisfaction of the jury beyond a reasonable doubt every material allegation in the indictment, and, unless this has been done, you should find the defendants not guilty.

Necessary *corrolaries* of these propositions are well stated in two further instructions which we give at the request of the defendants. You are instructed that where there is no evidence offered as to the previous good character of the accused, the presumption of such good character exists in his favor. A defendant in a criminal case is not obliged to become a witness in his own behalf and no inference of guilt can be drawn by the jury because a defendant has not testified at this trial. This presumption of innocence with which each one of these defendants is clothed is the principle by which you must test the convincing force of the testimony, because it is

your duty to attempt to reconcile the testimony with the theory of innocence, if that may be reasonably done. So long as any reasonable theory of innocence remains, you should indulge it and find the defendant to which that conclusion applies not guilty. By inflection the court has endeavored to emphasize the word "reasonable." It is a reasonable theory only of innocence that will protect. It is a reasonable doubt only that will protect. It is not true as has been argued to you, that you should acquit if there is any possible chance to find any defendant innocent; that you cannot convict unless no possible chance exists, in your judgment, to find him innocent. That is not the law. It is difficult to define the term "reasonable doubt" beyond its own wording.

This jury is to act as a deliberative body; each member is to contribute his best reasoning and his best judgment and his best recollection of the testimony, that is, to advise his fellow members of the jury his very best judgment upon the force of the testimony arrived at after he has put the various elements of testimony in their proper and logical relation to each other and has attempted to logically draw those deductions from that testimony which he thinks are proper. Each one is required to test his conclusions whether for or against any defendant, in the light of the observations and criticisms and suggestions of his fellows, and after you have earnestly and honestly endeavored to collaborate with each other in that way, if there remains in the mind of any one of you a doubt that is honestly the outcome of your careful deliberation and consideration of your fellows advice, that the defendant is guilty, that you may well say is a reasonable doubt, and you should abide by it, not to yield it

until you are convinced that it is no longer reasonable. But not every doubt is a reasonable doubt. A captious theory is not a reasonable doubt. A position taken after a lot of vague theorizing of what might have been possible, unsupported by any evidence, would not be a reasonable doubt. This jury is to act only upon the evidence.

Now, what is evidence? There is a great difference between testimony and evidence. Testimony is the vehicle by which evidence comes to a jury. Testimony may be sometimes evidence, but your fair, reasonable, logical inferences and deductions from accepted testimony become evidence also. Appearances may become evidence, if you are careful in allocating them to their proper place in the sequence of facts. Evidence is a much broader term than testimony. But you never can get evidence until you have testimony. So it is the evidence that you look to for your enlightenment to control your judgment, after you have given the testimony, as the conduit of the evidence, careful consideration. Now, evidence may be negative as well as positive. I say that in this case because of the very peculiar state of this record. It is quite unusual. The evidence upon which the government depends for a conviction of each one of these defendants is, in the main, undisputed. As we say that to you, we are not conscious of any place where it is disputed; we may have forgotten something. That is the reason we say in the main it is undisputed.

In behalf of two of the defendants, the effect of the government's testimony has been attempted to be explained. I think it is proper right here to allude to the functions of the court and jury at this juncture. The

criminal practice in the United States courts, is uniform throughout the county. It is the practice which was adopted when the Constitution of the United States went into effect and, in the particulars which the court now has in mind, it has not been changed since then. That practice makes the court the assistant to the jury in weighing the facts. I am not yet familiar enough with your California practice in criminal cases to know how far it departs from the federal practice in other states. I know I have sat in states where the departure was very great, but we are privileged in this practice throughout the United States—I mean federal judges—to make extensive comment upon the testimony in instructions. We are even empowered, if that function is discretely exercised, to advise the jury how the court weighs the facts and what the court's conclusions are as to any disputed question of fact. In 20 years experience on this bench I have not attempted to go that far in very many cases, if ever, and it is not the court's purpose to go that far here. I only speak of it because some of you may be more familiar with a different practice and think it is strange that we go as far as we may go in this instruction. But you are the sole judges after all of the facts in the case, and not the court. The court may discuss the facts only by way of assisting you to put the facts accepted by you in their proper legal relationship, only to make the law of the case clear to you, not to influence your judgment as to what the ultimate facts are.

We may speak of the facts by way of illustration of a point of law which we feel necessitated to make. We may speak of the facts by way of illustrating what powers of consideration and what range of considerations

should be entered into to weigh facts. Just as we have said. the government's testimony is, in the main, undisputed, but whatever we may do or have already done which may give to any one of you some sort of impression as to how this court considers the merits of this case. it is very necessary that you should not permit yourselves, as the sole judges of the facts, to be weighed by any such thought or influence of impression, but be jealous that you should be unaided by the court, except as the court advises you as to the law and incidentally discusses the facts and that your province is not invaded as the sole judges of the facts. You are the sole judges of the credibility of witnesses. Now, credibility is an incident of a trial which is affected by testimony and evidence, and when we discuss your privileges as the sole judges of the credibility of witnesses, we may say something about facts that bear upon that subject and can, except as the court aids you by whatever we may say on those subjects, to fully consider this case in all its bearings and you should not permit yourselves to be influenced by what you consider the court's opinion as to the credibility of any witness, but exercise your function unaided by any such impression, as the sole judges of that credibility.

What we have said about the undisputed character of the government's testimony applies to each one of these counts. The first count is a very important count in a practical way, because whomever you may convict upon the first count as a co-conspirator will be thereby very gravely affected as a necessary consequence respecting any one of the subsequent counts. I think later we will make that more plain. The first count is the conspiracy

count, charging each of these four defendants with having had an understanding to cooperate in the violation of the laws of the United States pertaining to the illegal manufacture, distillation and possession of intoxicating liquors. Only four are indicted here. So far as I can read it, the indictment is silent as to whether or not others may have been in it. You may perhaps assume from some things you have heard in this case, that others may have been interested in it; these men on the hill, the two, and their conduct; the man with the truck which disappeared. It may be speculative, but at least considered by you as possible members of this conspiracy. There is a piece of evidence in this case undisputed to the effect that in the Bruno house provisions at the table were made, in the arrangement of the table furniture, for seven people. But if you consider that the indictment does not include everybody who may have been in this deal, that would not be the slightest excuse for you to question the inclusion of any of the four men who are included in the indictment.

How is a conspiracy proved? Mr. Herron gave a very fine definition of conspiracy in his argument. It was worthy of what the assistant district attorney said about it. A conspiracy is an agreement between two or more people—and. please note, that you cannot convict anybody in this case of conspiracy unless you convict two of those named—at least two. A conspiracy is an understanding between two or more people commonly called an agreement—it seems to me "understanding" is much the better word—to commit an unlawful act, and, in the case of the United States, to commit, as our statute phrases it, an offense against the United States; and

that is what is charged here. The charge must, as it does here, specify the sort of an offense committed, and the charge would be insufficient if, further, the district attorney had not alleged one or more so-called overt acts. At common law it was an offense for two or more men to reach an understanding that they would do an unlawful thing without doing anything more than that, but in this country men who enter into such an unlawful agreement are given an opportunity to repent, and the conspiracy as it was known at common law does not become actionable until, after having formed the understanding, one of the parties does something to make it active, and that is called an overt act.

There are five overt acts set out in this indictment. The government must prove at least one of them before it can make a case, and prove it beyond a reasonable doubt. The court is privileged to say to you, and we do now, under the qualification we have already made, that the proof offered by the government, uncontradicted and unexplained, would justify you in finding each one of these defendants guilty as a co-conspirator. We say it would justify you; we do not say you should do that, because if we should say that we would be invading your province as the sole judges of the facts of the case. We can only say to you that, as a matter of law, these facts, if you deem them to exist, are sufficient in law to support a conviction, but it is for you to say whether you want to make those deductions yourselves and whether you are compelled by a judgment beyond a reasonable doubt to make them to the extent of convicting any one of these men. That man is a co-conspirator subject to conviction who consciously aids or assists in the unlaw-

ful enterprise, no matter when he joins it. If two or more men start an unlawful enterprise and are seen to be consciously cooperating in this enterprise, the fact that they are found doing that sort of thing under circumstances which indicate that they are actually and consciously cooperating with minds fixed upon the same result, that establishes the proof of the existence of the conspiracy as well as fixing each one of them as a co-conspirator. Having started the enterprise and while it is in process of execution, some third man comes in, it may be months after the thing has started, and consciously joins the group—and by consciously I mean joins it knowing what he is doing and joins it for the purpose of associating himself with the co-conspirators—he then becomes a co-conspirator and, by adoption, he is responsible for what has been done before he entered the combination. When once parties have entered upon the execution of their conspiracy, each individual becomes the agent of the other in any transaction that has for its object the benefit of the combination. A man may become a co-conspirator without having any interest whatever in the outcome. He may become a co-conspirator if his interest is the slightest, as a mere employee, as a co-conspirator under such circumstances, if he lends himself in any substantial way to the furtherance of the enterprise, no matter whether he has any financial interest or not; no matter whether he is the principal or the most inferior employee. The test is his conscious association with the unlawful enterprise, any act that he performs, however slight, if still having an effective office, connects him with that enterprise if he performs it consciously.

Of course, if you should conclude from your consideration of this case beyond a reasonable doubt that the two men on the hill had an interest in this situation, as associates, and that Verda, to warn them that this raid was in progress, waved his handkerchief at them to permit their escape, give them a chance to escape, that act of Verda's, if it were performed for that purpose, would be the act of a co-conspirator. We are using this only as an example. Pray do not understand that we are attaching to it any special importance by way of emphasizing it. We are trying to give you a clear understanding of what the law considers evidence of interest of a person under observation in a current, ongoing conspiracy, because at the time of the visit of the officers to this ranch, when this act of Verda's, whatever it was, was done, the conspiracy was still ongoing; it had not yet come to a termination. The officers had not yet put anybody under arrest nor had they uncovered the fact that a violation of the law was in progress.

Now, you should not be unmindful of Verda's explanation of that act of his. He admits he performed it. He tells you that he did it by way of salutation merely to these people on the hill. We can perhaps illustrate how a man may be connected with this conspiracy by considering the testimony respecting Verda's connection, with the testimony respecting Bruno's alleged connection, for illustrative purposes only. Before we do that, however, the jury will see very plainly, the validity of the explanations that the defendants offer in their own behalf, the strength or weakness of the government's case, cannot be properly appraised unless you consider this testimony, these various classifications, in the setting in which these

events transpired. You saw enough in the view that you had of the premises. The view you had was for the purpose of interpreting the testimony, but the testimony told you that this was an unlawful enterprise of unusual magnitude; that to establish it demanded a great deal of preparation; it demanded a very considerable tearing up of Bruno's property, several trees were uprooted and much excavation was necessary. To one who was familiar with the property then and after, as Bruno was before and after—before the enterprise was begun and after it was in going condition, as Bruno was, or to one who was there several days, as Verda was, there were some very significant and obvious conditions. There was an enormous quantity of fuel in this shed; there was quite a revision of the landscape where the willow trees had been; there was an active fermentation of 40 or 50 thousand gallons of mash, the fumes of which were escaping in the air through the ventilators which you observed; there was activity in this 40-horse-power boiler shown by the heat. Two senses at least of man were assailed by what happened there and what was going on, the sense of sight and the sense of smell.

I am satisfied this jury was astonished when it got there and saw what a bold act was undertaken and accomplished in the setting up of this distillery. So, when you consider the government's testimony against any of the defendants, upon which the government relies to charge that individual as a co-conspirator, you are privileged to interpret the force of that testimony in the light of this testimony, this atmosphere, these surroundings that we speak of, and also weigh the force of the explanation not only by consideration of the explanations

themselves, but by relating the explanations to the testimony of the government.

It is said that the explanations of Verda and Bruno are uncontradicted. It is true, and if you accept them or if they are sufficiently appealing to you to raise a reasonable doubt of the guilt of either one of them, you should acquit him—acquit that one. But the fact that they are uncontradicted does not mean that you are to accept them on that account alone. You are to test them in the light of the whole case and test them for reasonableness also, because, as the sole judges of the credibility of witnesses, you are affected by the reasonableness of the story the witness tells.

Verda says that four days before the raid he was approached by a stranger, Ramirez, and hired by him to go to this place and take care of his, Ramirez's mules, and do whatever was necessary to be done. As to that the testimony is somewhat obscure. The mules were part of the equipment of this unlawful transaction and Verda admits that he was employed to take care of that much of the property of one, who, if he existed, as Ramirez or whatnot, was clearly one of those responsible for this violation of the law. You know where the mules were, and you know where they were taken care of and you know how close they were and Verda's duties regarding them, to the place where this very great violation of the law was taking place. He was hired by Ramirez and the wages fixed. It is in testimony here, however, that he also said that Bruno was his boss. He tells you that in the four days that he was there he saw no one in and about the house, even at night. Yet there is evidence here, undisputed, that in the dining room the table was set for seven people.

Being conscious now of the magnitude of this enterprise and the help that logically was necessary to carry it on, and the fact, because of the warmth of the boiler, that there had been some activity there in the four days, in all probability, it is for you to consider how reasonable Verda's explanation for statement is that he saw no one or was conscious of no one around the premises except on one night he heard someone outside. As we have said, you are to consider the reasonableness of this explanation in the light of what you not only know, having observed the premises, was the situation there, but as to how you were advised by the undisputed testimony for the government.

In the same way the testimony in his own behalf of Bruno, if what he says about it is true, or if you have sufficient confidence in it to cause you to entertain a reasonable doubt of his guilty, then, of course, you ought to acquit him, but you should look to the whole case and consider the testimony which has been offered regarding his activities and the reasonableness of his story in the light of what you have seen and how you would assume he would act, before you can reach a conclusion which the law would be satisfied with.

Now, you must be careful, however, in judging either one of these two defendants, without giving some consideration to his personality. The question is not how you would act under circumstances which are seen to have surrounded either Bruno or Verda; the question is not what an ordinarily reasonable man would do, but you have seen Bruno and Verda on the witness stand; you have heard something about them. The question is what appraisement do you make of their acuteness of observation

and reasoning; how do you size them up; what do you think they would have noted or how should they have reacted to those circumstances. Undoubtedly there was a lease between Bruno and the man passing for this record as Ramirez. You have the terms of the lease in the testimony. You have got Bruno's explanation of it. Bruno says that after he made this lease, he left the premises alone from August until after the middle of January. The lease was for one year. He was advised that his tenant was to attempt to raise alfalfa and was to precede that attempt by some quite radical excavations and modifications of the premises in an effort to hunt water, not having water enough to irrigate the premises for alfalfa, the land not then being capable of that sort of culture, without irrigation. It is for you to say whether that is a reasonable explanation on the face of it; whether it is reasonable that after Bruno was advised of what was to happen to his property he would not be curious enough to see what actually was going on by way of preliminary improvements to his property; whether it was reasonable that anybody would rent that property under these circumstances, with the uncertainty ahead as to water that it might be adapted for that sort of culture, and rent it only for a year; whether it is reasonable that anybody would take that property over with the purpose of committing so flagrant an offense against the United States as actually occurred there before the middle of January, and then invite the landlord to come back and in the proximity of this distillery drill this ground to seed, to barley, and then, of course, you will test the reasonableness of Bruno's explanation in the light of the testimony of these neighbors of his, which tend to very greatly qualify his explanation,

in our judgment at least. Just as you test the explanation of Verda as to his conduct in waving the handkerchief to these men on the hill as a salutation, giving them "good-bye"—it is not shown he had any interest in these people or that they were friends of his or had any occasion for giving these distant people such a friendly salutation.

Now, gentlemen, if there is anything in this testimony that you think the court should have alluded to by way of qualification of exemplification or enlargement, either way, in his comment upon this testimony affecting these men, it is your duty to apply those matters yourself. We are making this comment solely by way of illustration.

It would seem to have been insisted here, because Verda and Bruno's explanations were undenied, that you must accept them but, as the sole judges of the credibility of witnesses, you are bound to scrutinize explanations made by interested parties before you accept them, and measure them according to their inconsistencies, if any, or their conflicts with other testimony which you may accept.

Now, there is no explanation of any of the other testimony. You are justified in assuming that the pipeline from the Quirin mine to the well or to the still was an essential factor of this unlawful operation. You have seen how obvious that was in its close association to the Quirin residence, and, in the absence of anything to qualify the force and effect of that testimony, you are justified, if you conclude to do so, in assuming that Quirin permitted his premises to be used in this enterprise, at least to that extent and if he did that consciously, knowing that he was making thereby a contribution to this unlawful act, he associated himself with it as fully as if he were there all the time actively at work underground, and this is inde-

dependent of the other testimony which has been argued to you, coming from the government, of his association with the man Connley—otherwise Walker—and Bruno at various times.

We think we need not dwell upon the testimony which affects and connects the defendant Walker with these transactions. It is not proper to pick out instances or items and treat them as isolated matters, and ask you to consider whether that particular thing is an indication of guilt. It is the combination of circumstances, the association of events, which you are to look to. Any one of these taken alone may be considered as a merely innocent gesture, but if in combination it is seen to be an effective part of circumstances to a certain unlawful end, that is an entirely different matter. Now, it follows—sufficiently in this case, at least, because of the uncontradicted nature of the government's testimony—that whomever you convict, if two or more, under this conspiracy charge, may be convicted under each one of the other charges. If there was a continuing conspiracy there from the beginning until the raid, it is reasonable for you to assume that what were there in the shape of mash, manufactured products and so forth, were the fruits of that conspiracy, for which each one of the co-conspirators was responsible. The possession of one would be the possession of every other one.

It is altogether probable that Verda, for instance, is a very minor factor in this case. It may be that Bruno's connection was not very active, but those are not matters which go to the question of guilt at all, that is, they only temper the case against them, not weaken it. Those are matters which the court will take care of. A wide range of punishment is afforded by the statutes violated clearly

in this case. The court is given very wide discretion by way of fine or imprisonment, which, of course, we exercise according to the significance of the individual as one of the factors of the conspiracy. Never should any consideration of that kind enter into the jury's deliberations, because then you would be doing what you have no right to do. You would be invading the province of the court.

Anything for the government?

Exception No. 44.

MR. OHANNESIAN: The government is satisfied, your Honor.

THE COURT: Defense?

MR. GRAHAM: If the court please, to the failure of the court to give instruction number one, requested by the defendants, which is to the effect that to warrant a conviction for conspiracy to violate a criminal statute the evidence must disclose something further than participating in the offense which is the object of the conspiracy—

THE COURT: You may take your exception for failure to give number one.

(The court at the request of the defendant Verda further instructed the jury as follows:)

THE COURT: You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the court. Such evidence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been introduced before you and the inferences which you may deduce therefrom, and such presumption as the law may deduce therefrom as stated in these instructions, and upon the law as given you in these instructions.

(The court at the request of the defendants further instructed the jury as follows:)

THE COURT: The testimony of one witness entitled to full credit is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony, even though a number of witnesses on the other side might testify to an opposite state of facts, if, from the whole case, the jury believes that the greater weight of the evidence, considering its reliability and the credibility of the witness, is on the side of the one witness as against the greater number of witnesses.

(The court then further instructed the jury as follows:)

THE COURT: Before you may convict any one defendant of the crime of conspiracy as charged in the indictment, you must believe from the evidence beyond a reasonable doubt:

First, that a conspiracy existed as charged in the indictment.

I will stop right here to say you cannot evade the con-*con*clusion that a conspiracy existed as charged in the indictment. The question is as to the co-conspirators.

Second. That such defendant was a party thereto.

Third. That one or more overt acts charged in the indictment were committed within the jurisdiction of this court, and you are further instructed that the fact that such defendant was a party to the conspiracy must be proved by evidence of what that particular defendant himself did or said or by evidence of what was done or said by other conspirators in his presence and cannot be proved by evidence of what others did or said out of his presence.

That mere knowledge—I am giving number five now—of the commission or intended commission of a crime is not sufficient to render a person guilty thereof unless the

person having such knowledge knowingly participated therein.

(The court further instructed the jury as follows:)

THE COURT: When we say it must be shown that the party charged as a co-conspirator, "consciously aided," means that he knew what he was doing and was willing to do it, and knew what it was to accomplish.

(In answer the request of defendants that their instruction No. 9, which is set out at length in Exception No. ....., the court further said:)

THE COURT: No, I cannot give that because that is not the law. That is not the law. We have that very question many times in these conspiracy cases. Conspiracy may be proven by acts or declarations of co-conspirators in connection with other facts which, put together, show that there is a concert of action.

(The court further instructed the jury as follows:)

THE COURT: That act of Verda (in waving his handkerchief), if the jury considers it to be an incriminating act, applies only to his case.

Exception No. 45.

MR. GRAHAM: I have one or two exceptions to the instructions of the court, to the effect that the proof offered in this case by the government, if uncontradicted and unexplained, would justify the jury in convicting the defendants—

THE COURT: The court stated that with the qualification which the jury will recall, undoubtedly.

MR. GRAHAM: I do not recall the exact language the court gave in that instruction, but I think with my mentioning of it it has been identified sufficiently to take exception to that instruction.

THE COURT: Very well.

Exception No. 46.

THE COURT: The court feels like apologizing for an occasional show of temper, too. Mr. Belt, have you something to say?

MR. BELT: Yes, I have an exception I would like to have noted, your Honor, in the interest of the defendant Quirin, to the statement that the jury would be warranted in believing that Quirin permitted water knowingly to be taken from his reservoir for use in the still.

THE COURT: The court means by that—and if I didn't make it plain, I will do so now—that in view of all the circumstances the construction there at the mine, especially in proximity to Quirin's residence, the character of the pipe and the direction which it took, the ownership of the property by Quirin and the incidents that would normally accompany the pumping of water in that shaft to go through that pipe, these things unexplained would warrant the jury in concluding that Quirin consented consciously, knowingly and willingly to the use of his premises to that extent to aid this unlawful enterprise. When we say that we do not mean that should be your conclusion, because that is your business, not the court's. I am only telling you if you base upon those incidents a conclusion that Quirin was a party to the conspiracy, it would stand in law. That is all.

(The court further instructed the jury as follows:)

THE COURT: Now, gentlemen of the jury, again we remind you that you are the sole judges of the facts of the case and that you are to exercise this function unaided by any impressions you may have respecting the court's opinion as to the guilt or innocence

of any of these defendants. You must not permit yourselves to be aided in your cogitations on this case by what you think the court thinks about it. You are the sole judges of the credibility of these witnesses, and we remind you of what was said in the beginning about the office of reasonable doubt. In a conspiracy case, as in other criminal cases, the several accused here are presumed to be innocent until the contrary is shown by proof. Whether that proof is in whole or in part circumstantial, the circumstances relied upon by the prosecution must so indicate the guilt of the accused as to leave no reasonable explanation of them which is consistent with the accused's innocence. It is just what the court said before, but we are giving it in this form at the request of the defendants. The hypothesis of guilt should flow naturally from facts proven, and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or with guilt—I do not think you mean that, gentlemen.

MR. GRAHAM: What is the number of that, your Honor?

THE COURT: Oh, I beg your pardon. If the evidence can be reconciled either with the theory of innocence or with guilt, the law requires that the defendant be given the benefit of the doubt, and that the theory of innocence be adopted.

Now, Gentlemen, we have caused to be prepared for you a blank verdict with places where your conclusions may be entered as to each count, and as to each one of the four defendants. At this hour we will not read this verdict. I do not think you will need to have the court explain it to you, because we are certain you will

understand how to complete it. In the blank places—and there are 20 of them—5 as to each defendant, you will enter the word "guilty" or the words "not guilty" in the appropriate places, according as you conclude as to the guilt or innocence of the defendant then under consideration, after you have considered all the evidence.

You are now to retire in charge of an officer and when you have agreed upon a verdict you may separate and cause your foreman to seal it and carry it on his person and bring it into court tomorrow morning at 10 o'clock. There are six counts as to each defendant and not five, as the court said.

Exception No. 47.

MR. HERRON: May we, your Honor, respectfully suggest, in following the practice here, Judge James informed us in a case tried not so long ago that unless the instruction was read in the presence of the jury that our exception would not be preserved, in this particular circuit. If I, therefore, may read it just briefly and we may have our exception, it being understood we are reading it in—

THE COURT: It is 20 minutes after four. Certainly the record can be preserved by reading it after the jury has taken the case over.

MR. HERRON: If it may be deemed to be read, after the jury has been excused, all right. You stipulate, then, that it may be deemed to have been read in in the presence of the jury?

MR. OHANNESIAN: Yes.

(Thereupon, the jury retired.)

Exception No. 48.

MR. GRAHAM: If the court please, there are three instructions I want to read into the record.

THE COURT: Oh yes, yes.

MR. GRAHAM: It may be admitted they were offered?

THE COURT: Yes. Here they are.

MR. GRAHAM: They were presented last Thursday. To the failure of the court to give instruction No. 9, as requested by the defendants, we except. This instruction is as follows:

Without independent proof of the existence of the conspiracy and of the participation of a particular defendant therein, the act of declaration of an alleged co-conspirator relating to the conspiracy may not be proved for the purpose of proving the conspiracy or proving that any one of the defendants was a party thereto.

Exception No. 49.

To the failure of the court to give instruction No. 11 as requested by the defendants, the defendants except. This instruction is as follows:

While a declaration of a conspirator made during the pendency of a conspiracy is admissible against all parties shown by the evidence to have been members of the conspiracy, yet, before the declarations of a conspirator can be considered as evidence against any defendant, unless it is made in the presence of such defendant, there must be sufficient competent evidence independent of such declaration to prove that such defendant was a party to the conspiracy.

Exception No. 50.

To the failure of the court to give instruction No. 14, as requested by the defendants, we except. This instruction is as follows:

In order to establish the existence of a conspiracy, there must be proof other than the statements or declarations of an alleged conspirator; hence the extra judicial declarations or statements of any defendant in this case standing alone and of themselves, if any such were made, are not sufficient to show the existence of a conspiracy.

Now, Mr. Ohannesian has stated before it may be stipulated these requested instructions, which were refused, may be deemed to have been read and excepted to in the presence of the jury.

MR. OHANNESIAN: That is quite true.

(The jury returned to the courtroom at 5:30 p. m. Whereupon, the following proceedings were had:)

THE COURT: Are the defendants all here?

MR. GRAHAM: They are outside, your Honor.

THE COURT: Bring them in. Gentlemen, the court understands you have something to present.

A JUROR: Your Honor, we would like to have a repetition of your instructions as to conspiracy, whether or not two or more of the defendants had to be guilty of conspiracy, or would one be guilty of conspiracy with an outside party.

THE COURT: No, as this indictment is found there can be no conviction of conspiracy unless you find two of the four named as co-conspirators.

THE JUROR: That is all.

MR. OHANNESIAN: Your Honor,—

THE COURT: Is that your understanding, gentlemen?

MR. OHANNESIAN: Your Honor, the indictment reads—pardon my interrupting—"With the defendants and parties unknown."

THE COURT: Where is that? I did not notice that in the indictment.

MR. OHANNESIAN: Yes. I want to call your attention to that.

THE COURT: If that is the case, we are wrong about it. You are right about that, Mr. Ohannesian.

MR. HERRON: You are right.

THE COURT: "Conspired with each other and with divers other persons whose names are to the Grand Jurors unknown." Yes. If you find beyond a reasonable doubt from this evidence—and you must find it from the evidence—that parties unknown were associates with one or more of the four who are named here as co-conspirators in the conspiracy as depicted in this indictment, then it will be possible for you to find a verdict of conspiracy against but one of the defendants indicted. Is that your constructions?

MR. OHANNESIAN: Yes. I think the court said that fact was to be beyond a reasonable doubt.

THE COURT: Yes, I said so. The fact must be found, the fact there were others unknown with whom the one that you conclude to have been the party conspired and cooperated in the conspiracy as depicted in this indictment, and if you so find, then the return may be to that effect.

It is hereby stipulated that the foregoing Bill of Exceptions contains all of the evidence, oral or documentary.

adduced at the said trial and all of the proceedings had therein.

The defendants hereby present the foregoing as their proposed Bill of Exceptions herein, and respectfully ask that the same may be allowed.

C. L. Belt
Mark L. Herron
Russell Graham
Attorneys for the Defendants.
By Russell Graham
Of Counsel.

To Samuel W. McNabb, Esq.,
United States District Attorney.
Sir:

You will please take notice that the foregoing constitutes, and is, the Bill of Exceptions of the defendants in the above entitled action, and the defendants will ask the allowance of the same.

C. L. Belt
Mark L. Herron
Russell Graham
Attorneys for the Defendants.
By Russell Graham
Of Counsel.

STIPULATION RE BILL OF EXCEPTIONS.

It is hereby stipulated that the foregoing BILL OF EXCEPTIONS is correct as amended, and contains all the evidence adduced at the trial, and that the stipula-

tions therein mentioned are correct, and that the same may be settled and allowed by the court.

C. L. Belt
Mark L. Herron
Russell Graham
Attorneys for the Defendants.
By Russell Graham
Of Counsel.
Samuel W. McNabb
SAMUEL W. McNABB
United States Attorney.
By.....

ORDER APPROVING BILL OF EXCEPTIONS.

This Bill of Exceptions having been duly presented to the Court and having been amended to correspond with the facts, is now signed and made a part of the records in this cause.

DATED this 24th day of April, 1930.

John M Killits
Judge.

[Endorsed]: Original In the District Court of the United States for the Southern District of California Central Division. Hon. John M. Killits, Judge Presiding. United States of America, Plaintiff, vs. Nick Bruno, Joe Verda, Peter Connley, alias George Walker, and Herman Quirin, Defendants. No. 9926-M. Criminal. Received copy of within Bill of Exceptions this 11 day of April 1930 S. W. McNabb, U. S. Atty. Bill of Exceptions on behalf of Peter Connley and Herman F. Quirin. Lodged Apr 11, 1930 R. S. Zimmerman, Clerk By Edmund

L. Smith, Deputy Clerk Filed Apr. 24, 1930 R. S. Zimmerman, Clerk By B. B. Hansen Deputy Clerk. Reported by: Ross Reynolds C. W. McClain Ray E. Woodhouse. Reynolds & McClain shorthand reporters and notaries Official Reporters U. S. District Court Suite 208-9-10 Wilson Building First and Spring Streets Los Angeles, Calif. Mutual 2708.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	No. 9926-M Crim.
VS	)	
PETER CONNLEY and HERMAN F. QUIRIN, Defendants.	)	PETITION FOR APPEAL

TO THE HONORABLE THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, AND SAMUEL W. McNABB, ESQ., UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF CALIFORNIA, AND TO THE HONORABLE THE CLERK OF THE ABOVE ENTITLED COURT:

You and each of you will please take notice that the defendants, Peter Connley and Herman F. Quirin, desire to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgments and sentences, heretofore, to-wit, on the 2nd day of April, 1930, made and entered against said defendants in the above en-

titled cause, and from each and every part thereof, and present herewith their assignment of errors and pray that such appeal be allowed.

Dated April 2, 1930.

C. L. Belt.
Mark L. Herron
Russell Graham
Attorneys for Defendants.

[Endorsed]: Original. Original No. 9926M Crim. In the United States District Court Southern District of California Central Division. United States of America Plaintiff vs Peter Connley and Herman F. Quirin, Defendant Petition for Appeal Received copy of within Petition this 2*st* day of April 1930 Samuel W. McNabb, J.G.O. Attorney for Plaintiff Filed Apr. 4, 1930 R. S. Zimmerman, Clerk, By W. E. Gridley, Deputy Clerk. Mark L. Herron Russell Graham 311 American Bank Building Second & Spring Streets Los Angeles Attorneys for Defendants

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IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	No. 9926-M Crim.
vs.	)	
PETER CONNLEY and HERMAN F. QUIRIN, Defendants.	)	ORDER ALLOWING APPEAL AND FIXING BOND

Upon motions of Messrs. C. L. Belt, Mark L. Herron and Russell Graham, attorneys for the defendants Peter Connley and Herman F. Quirin, and upon filing the no-

tice of appeal from the judgments and sentences rendered against said defendants, together with an assignment of errors;

IT IS HEREBY ORDERED that an appeal be and hereby is allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgments and sentences heretofore entered herein against said defendants;

That pending the decision upon said appeal the defendant Peter Connley be and he is hereby admitted to bail upon said appeal in the sum of $12,000.00; and that the said defendant Herman F. Quirin be and he is hereby admitted to bail upon said appeal in the sum of $6,000.00; and that the bonds be conditioned that if the judgment be affirmed or the appeal dismissed the several fines and the costs of the prosecution will be paid.

That a cost bond be given by said defendants in the sum of $250.00 each.

Dated April 2, 1930.

Approved as to form:
S. W. McNabb
United States Attorney

John M. Killits
Judge.

[Endorsed]: Original Original. No. 9926M Crim. In the United States District Court, Southern District of California, Central Division. United States of America, plaintiff, vs. Peter Connolley and Herman F. Quirin, defendants. Order allowing appeal and fixing bond. Received copy of within order this 2*st* day of April, 1930 Samuel W. McNabb, by J G O. Attorney for plaintiff. Filed Apr. 4, 1930. R. S. Zimmerman,

Clerk, by W. E. Gridley Deputy Clerk. Mark L. Herron Russell Graham, 311 American Bank Building, Second and Spring Streets, Los Angeles, Attorneys for defendants.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	No. 9926M Crim
vs.	)	ASSIGNMENT
PETER CONNLEY and HERMAN F. QUIRIN, Defendants	)	OF ERRORS

Come now Peter Connley and Herman F. Quirin, the defendants above named, and file the following statement and assignment of errors, upon which they and each of them will rely upon the prosecution of their appeal in the above-entitled cause:

I.

That the Court erred in its rulings in admitting testimony over the objections of the defendants, to which rulings exceptions were duly taken.

II.

That the Court erred in excusing the jury and in questioning the witness Richard Kelley, and by striking the bench with his fist and by conducting himself in such a manner, during such questioning, as to terrorize and intimidate the said witness Kelley, in the absence of the jury, and to frighten the said witness Kelley into

testifying in part as it is apparent from the record the Court desired him to testify.

III.

That the Court erred in refusing to allow counsel for the defendants, or any of them, to interrogate the witness Kelley out of the presence of the jury, after the Court had questioned such witness out of the presence of the jury.

IV.

That the Court erred in then questioning the witness Kelley in the presence of the jury after the Court had, out of the presence of the jury, intimidated the said witness Kelley as aforesaid.

V.

That the Court erred in intimidating the witness Charles Cruse by ordering the arrest of the witness Kelley at the conclusion of the testimony of the witness Kelley, because the Court was not satisfied with the testimony of the said witness Kelley.

VI.

That the Court erred in excusing the jury and in questioning the witness Amsbaw in such manner as to intimidate the witness Amsbaw.

VII.

That the Court erred in refusing to allow counsel for the defendants, or any of them, to interrogate the witness Amsbaw out of the presence of the jury, after the Court had questioned such witness out of the presence of the jury.

VIII.

That the Court erred in then questioning the witness Amsbaw in the presence of the jury after the Court

had, out of the presence of the jury, intimidated the said witness Amsbaw as aforesaid.

IX.

That the Court erred in denying the motion of each of said defendants for a directed verdict of not guilty, made at the conclusion of the Government's case and renewed at the close of the entire case, which said motions were made upon the ground of the insufficiency of the evidence as to each defendant and as to each and every count of the indictment.

X.

That the Court erred in refusing to give the jury instructions numbers 1, 9, 11 and 14, which instructions were requested by all defendants, and to which refusal the said defendants excepted.

XI.

That the Court erred in instructing the jury as a matter of law that there was sufficient evidence in the record to justify the conviction of each and every defendant charged in the indictment as to each count.

XII.

That the Court erred in permitting counsel for the Government to misquote the evidence, and in refusing the defendants' request to instruct the prosecuting attorney not to misquote the evidence, and in refusing to instruct the United States Attorney to correct his misstatements, which said misstatements were specifically pointed out to the Court and excepted to.

XIII.

That the Court also erred in his language and manner in criticizing counsel for the defendants for calling such errors to the attention of the Court.

XIV.

That the Court erred in not compelling the prosecuting attorney to withdraw his statement to the jury to the effect that the only reason counsel were objecting to such errors in stating the evidence was that counsel, having been hired in the case, were willing to attempt to win the case at any cost.

XV.

Upon the foregoing assignment of errors and upon the record in said cause the said defendants pray that the verdict and judgment rendered therein may be reversed.

Dated April 2, 1930.

C. L. Belt.
Mark L. Herron
Russell Graham
Attorneys for Defendants
Connley and Quirin

[Endorsed]: Original, Original No. 9926M Crim. In the United States District Court Southern District of California Central Division United States of America Plaintiff vs Peter Connley and Herman F. Quirin Defendant Assignment of Errors Received Copy of within Assignment of Errors this 2*st* day of April 1930 Samuel W. McNabb, by J. G. O. Attorney for plaintiff. Filed Apr. 4, 1930. R. S. Zimmerman, Cerk by W. E. Gridley Deputy Clerk. Mark L. Herron Russell Graham 311 American Bank Building Second & Spring Streets Los Angeles Attorneys for Defendants

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff,	No. 9926-M
VS	AMENDED ASSIGNMENT
PETER CONNLEY and HERMAN F. QUIRIN, Defendants.	OF ERRORS

Comes now Peter Connley and Herman F. Quirin, the defendants above named, and file the following statement and amended assignment of errors, upon which they and each of them will rely in the prosecution of their appeal in the above entitled cause.

I.

That the Court erred in excusing the jury and in questioning the witness, Richard Kelley, and by striking the bench with his fist and by conducting himself in such a manner, during such questioning, as to terrorize and intimidate the said witness Kelley, in the absence of the jury, and to frighten the said witness Kelley into testifying in part as it is apparent from the record the Court desired him to testify.

II.

That the Court erred in refusing to allow counsel for the defendants, or any of them, to interrogate the witness Kelley out of the presence of the jury, after the Court had questioned such witness out of the presence of the jury.

III.

That the Court erred in then questioning the witness Kelley in the presence of the jury after the Court had, out of the presence of the jury, intimidated the said witness Kelley as aforesaid.

IV.

That the Court erred in intimidating the witness Charles Cruse by ordering the arrest of the witness Kelley at the conclusion of the testimony of the witness Kelley, because the Court was not satisfied with the testimony of the said witness Kelley.

V.

That the Court erred in excusing the jury and in questioning the witness Amsbaw in such manner as to intimidate the witness Amsbaw.

VI.

That the Court erred in then questioning the witness Amsbaw in the presence of the jury after the Court had, out of the presence of the jury, intimidated the said witness Amsbaw as aforesaid.

VII.

That the Court erred in denying the motion of each of said defendants for a directed verdict of not guilty, made at the conclusion of the Government's case and renewed at the close of the entire case, which said motions were made upon the ground of the insufficiency of the evidence as to each defendant and as to each and every count of the indictment.

VIII.

That the Court erred in refusing to give the jury instructions numbers 1, 9, 11 and 14, which instructions were requested by all defendants, and to which refusal the said defendants excepted.

IX.

That the Court erred in instructing the jury as a matter of law that there was sufficient evidence in the record to justify the conviction of each and every defendant charged in the indictment as to each count.

X.

That the Court erred in permitting counsel for the Government to misquote the evidence, and in refusing the defendants' request to instruct the prosecuting attorney not to misquote the evidence, and in refusing to instruct the United States Attorney to correct his mis-statements, which said mis-statements were specifically pointed out to the Court and excepted to.

XI.

That the Court erred in his language and manner in criticizing counsel for the defendants for calling such errors to the attention of the Court.

XII.

That the Court erred in accusing counsel for the defense of questioning the Court's veracity with reference to the written statement of the witness Amsbaw which was admitted in evidence as special Exhibit admitted by direction of the Court.

XIII.

That the Court erred in refusing to instruct the jury to disregard the statement that counsel for defendants had questioned the Court's veracity.

XIV.

That the Court erred in denying the defendants' motion to strike out and to instruct the jury to disregard the Court's statement purporting to disclose the contents of the said written statement of the said witness Amsbaw.

XV.

That the Court erred in permitting the United States Attorney to state in the presence of the witness, Cruse, an employee of the witness, Kelley, that the said Kelley had said "Well, they didn't get anything out of me. I could not read or write and they wanted to give me some glasses to read with and I had my glasses in my pocket all the time."

XVI.

That the Court erred in not permitting counsel for defendants to cross examine the witness Kelley with reference to an impediment in the speech of the person referred to in the testimony of said Kelley as P. Walker.

XVII.

That the Court erred in advising counsel making objections on behalf of the defendants that he was "too sensitive" about mis-statements of the United States Attorney in his closing argument when said counsel called the attention of the United States Attorney to mis-statements of the evidence with reference to the testimony concerning the teams which had been rented by the defendant Bruno, and further erred in suggesting that said counsel "take something" for said sensitiveness.

XVIII.

That the Court erred in permitting the United States Attorney in his closing argument to make the statement that the defendant, Quirin paid for the team with which the seeding about the still was done.

XIX.

That the Court erred in refusing to instruct the United States Attorney not to misquote the evidence with reference thereto.

XX.

That the Court erred in permitting the United States Attorney to repeat said mis-statement after his attention had been previously directed to it, and in criticizing counsel for the defendants for so directing his attention.

XXI.

That the United States Attorney was guilty of misconduct in stating inferentially in his opposing argument that Herman Quirin had a herd of 800 goats and that said goats were to be used in connection with a cheese factory. That the Court was guilty of misconduct in criticizing counsel for the defendants for calling the attention of the Court to the said mis-statement and in stating "he (the United States Attorney) is not making any mis-statement."

XXII.

That the United States Attorney was guilty of misconduct in stating in his closing argument "and when Mr. Herron, the former District Attorney of the United States, makes that statement, I am forced to say that is because he is employed by the defendants and he is obliged to defend them at any cost."

XXIII.

That the Court was guilty of misconduct in stating during the closing argument of the United States Attorney with reference to the remark in assignment No. XXII, "I think there has been unusual aggravation of Mr. O'Hannesian and he naturally yielded to it, but I hope he will be permitted to continue with his argument and I hope he will not permit himself to be aggravated by these unnecessary and irritating interruptions in making some extravagant remarks hereafter."

XXIV.

That the Court erred in instructing that the proof offered by the Government, if uncontradicted and unexplained, would justify a conviction of all of the defendants.

XXV.

That the Court erred in instructing the jury that the jury would be warranted from the evidence in concluding that Quirin permitted water to be taken from his premises knowing that it was to be used in a still.

Upon the foregoing amended assignment of errors and upon the record in said cause the said defendants pray that the verdict and judgment rendered therein may be reversed.

Dated this 7th day of May, 1930.

C. L. Belt
Mark L. Herron
Russell Graham
Attorney for defendants,
Connley and Quirin

[Endorsed]: Original. No. 9926-M. In the United States District Court, Southern District of California, Central Division. United States of America, plaintiff, vs. Peter Connley and Herman F. Quirin, defendants. Amended Assignment of Errors. Received copy of the within Amended Assignment of Errors this ..... day of May, 1930. Emmett E. Doherty attorney for plaintiff. Filed May 7, 1930 R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk. C. L. Belt, Russell Graham, attorneys 650 South Spring Street, Los Angeles, Telephone Trinity 6311, and Mark L. Herron, attorneys for defendants.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AmeRICA, Plaintiff, VS PETER CONNLEY and HERMAN F. QUIRIN, Defendants.	) No. 9926- M)STIPULATION) RE CERTIFI-) CATION OF) EXHIBITS) TO UNITED) STATES CIR-) CUIT COURT) OF APPEALS) FOR THE) NINTH) CIRCUIT

IT IS HEREBY STIPULATED by and between counsel for the respective parties in the above entitled cause that each and every original exhibits in said cause may be by the Clerk of the United States District Court in and for the southern district of California, central division, sent to the United States Circuit Court of Appears for the Ninth Circuit under a proper certificate from said Clerk in lieu of sending copies of such exhibits, excepting only that Exhibits Nos. 15 and 22 being heavy and cumbersome articles so large that it is impracticable to transport the same shall not be sent to the said Circuit Court of Appeals by the said Clerk of the United States District Court, but that photographs of the said above exhibits shall be taken under the direction of counsel for the respective parties and sent in lieu of said original exhibits.

IT IS HEREBY STIPULATED by and between counsel for the respective parties in the above entitled cause that said photographs of said original exhibits may be deemed to be and treated for all purposes as would the original exhibits were the same forwarded to the Honorable United States Circuit Court of Appeals.

Dated this day of April, 1930.

SAMUEL W. McNABB, UNITED STATES ATTORNEY,

By J. Geo. Ohannesian

Attorneys for Plaintiff

RUSSELL GRAHAM, C. L. BELT and MARK L. HERRON,

By Russell Graham

Attorneys for Defendants

[Endorsed]: No. 9926-M. In the United States District Court, Southern District of California, Central Division. United States of America, plaintiff, vs. Peter Connley, et al, defendants. Stipulation re certification of exhibits. Filed Apr. 29, 1930. R. S. Zimmerman, Clerk, by W. E. Gridley, Deputy Clerk. Russell Graham, Attorney 650 South Spring Street, Los Angeles, Telephone Trinity 6311. Attorneys for defendants.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

	)	No. 9926-M
	)	ORDER RE
UNITED STATES OF AMERICA,	)	CERTIFICA-
	)	TION OF
Plaintiff,	)	EXHIBITS TO
VS	)	UNITED
	)	STATES CIR-
PETER CONNLEY and	)	CUIT COURT
HERMAN F. QUIRIN,	)	OF APPEALS
	)	FOR THE
Defendants.	)	NINTH
	)	CIRCUIT

Good cause appearing therefor,

IT IS HEREBY ORDERED that each and every original exhibits in the above entitled cause may be by the Clerk of the above entitled Court sent to the United States Circuit Court of Appeals for the Ninth Circuit under a proper certificate from said Clerk in lieu of sending copies of such exhibits, excepting only that Exhibits Nos. 15 and 22 being heavy and cumbersome articles so large that it is impracticable to transport the same shall not be sent to the said Circuit Court of Appeals by the said Clerk, but that photographs of the said above numbered exhibits shall be taken under the direction of counsel for the respective parties and sent in lieu of said original exhibits.

Dated this 29 day of April, 1930.

Wm P. James
JUDGE

[Endorsed]: No. 9926-M. In the United States District Court, Southern District of California, Central Division. United States of America, plaintiff, vs. Peter Connley, et al, defendants. Order re certification of exhibits. Filed Apr. 29, 1930. R. S. Zimmerman, Clerk by W. E. Gridley, Deputy Clerk. Russell Graham, Attorney, 650 South Spring Street Los Angeles, Telephone Trinity 6311, Attorneys for defendants.

MEMORANDUM OF COSTS AND DISBURSEMENTS

DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
vs.
NICK BRUNO, et al.,
Defendant.
} 9926-M

DISBURSEMENTS

1.	Marshall's Fees include Items 5, 6 and 7	$ 20.00
2.	Clerk's Fees (to be inserted by clerk)	~~35.00~~
3.	Witness' Fees	323.50
4.	Jury Costs	349.40
5.	Service of Government witnesses	8.50
6.	Expense of serving witnesses	7.92
7.	Cost of taking jury and court to view premises	70.00
8.	Transcript	147.90
9.	Docket Fees	20.00
		947.22 taxed 947.22

UNITED STATES OF AMERICA
Southern District of
California
City of Los Angeles } SS:

Emmett E. Doherty, being duly sworn, deposes and says: That he is one of the Attorneys for the Plaintiff in the above-entitled cause, and as such is better informed, relative to the above costs and disbursements, than the said Plaintiff. That the items in the above Memorandum contained are correct, to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause.

E E Doherty

[Seal]

Subscribed and sworn to before me, this 9th day of April, A. D. 1930

R. S. Zimmerman, Clerk U. S. District Court
Southern District of California
By Edmund L. Smith, Deputy

To C. L. Belt, Attorney at Law, 404 American Bank Bldg., 129 W. 2nd St., Los Angeles.

You will please take notice that on Friday the 11th day of April, A. D. 1930, at the hour of 10 o'clock, A. M., Plaintiff will apply to the Clerk of said Court to have the within memorandum of costs and disbursements taxed pursuant to the rule of said Court, in such case made and provided.

Emmett E. Doherty
Emmett E. Doherty,
Attorney for Plaintiff.

Service of within memorandum of costs and disbursements, and receipt of a copy thereof acknowledged this 9 day of April, A. D. 1930.

C. L. Belt
Attorney for Defendants.

[Endorsed]: No. 9926-M United States District Court Southern District of California United States of America, Plaintiff, vs. Nick Bruno, et al, Defendant. Memorandum of Costs and Disbursements Filed Apr. 9, 1930 R. S. Zimmerman, Clerk by Edmund L. Smith Deputy Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA, Plaintiff and Appellee,	)	No. 9926-M
vs.	)	BOND OF
PETER CONNLEY and HERMAN F. QUIRIN, Defendants and Appelants.	)	PETER CONNLEY FOR COSTS ON APPEAL

UNITED STATES OF AMERICA,)
) SS.
SOUTHERN DISTRICT OF CALIFORNIA)

KNOW ALL MEN BY THESE PRESENTS:

That we, Peter Connley, as principal, and Fidelity and Deposit Company of Maryland, a Corporation, as sureties are held and firmly bound unto the United States of America, in the sum of Two Hundred Fifty ($250.00) Dollars, to the payment of which well and truly to be made we jointly and severally bind ourselves,

our executors, administrators and successors, firmly by these presents.

WITNESS our hands and seals at Los Angeles, California, this 8th day of April, 1930.

WHEREAS, on the 2nd day of April, 1930, in the District Court of the United States for the Southern District of California, Central Division, an order was entered denying the defendant's motion for a new trial, and on said date sentence was pronounced on the said Peter Connley, and on the 4th day of April, 1930, a citation was issued, directed to the United States of America, to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, pursuant to the terms and the date fixed in the said citation;

NOW, THEREFORE, the condition of the above obligation is such that if the said Peter Connley shall prosecute said appeal and answer all damages for costs if he fail to make good his plea, then the above obligation shall be null and void; otherwise to remain in full force and effect.

Peter Connley
Principal
Fidelity and Deposit Company of Maryland
By W. M. Walker
Attorney-in-Fact
Theresa Fitzgibbons
Agent
Sureties

We, the undersigned, attorneys for the said Peter Connley, hereby certify that in our opinion the form of the foregoing bond is correct, and that the sureties thereon are qualified.

C. L. Belt
Mark L. Herron &
Russell Graham
By Russell Graham
Attorneys for Appellant Peter Connley.

The foregoing bond is hereby approved as to form.
SAMUEL W. McNABB,
United States Attorney
By E. E. Doherty
Assistant United States Attorney.

The foregoing bond is hereby approved.
John M. Killits
U. S. District Judge.

STATE OF CALIFORNIA }
} ss.
County of Los Angeles }

On this 8th day of April, 1930, before me Elsie E. Armstrong, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared W. M. Walker and Theresa Fitzgibbons known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of

Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] Elsie E. Armstrong

Notary Public in and for the State of California, County of Los Angeles.

[Endorsed]: 9926-M United States of America vs. Peter Connley and Herman F. Quirin, Cost on Appeal Fidelity and Deposit Company of Maryland Baltimore F D Fidelity and Surety Bonds Burglary and Plate Glass Insurance Filed Apr 10 1930 R. S. Zimmerman, Clerk By W. E. Gridley Deputy Clerk Department of Southern California Bank of America Building 650 S. Spring St. Los Angeles, Calif.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA, Plaintiff and Appellee,	)	No. 9926-M
vs.	)	BOND OF
PETER CONNLEY and HERMAN F. QUIRIN, Defendants and Appelants.	)	HERMAN F. QUIRIN FOR COSTS ON APPEAL

UNITED STATES OF AMERICA,)
) SS.
SOUTHERN DISTRICT OF CALIFORNIA.)

KNOW ALL MEN BY THESE PRESENTS:

That we, Herman F. Quirin, as principal, and Fidelity and Deposit Company of Maryland as sureties are held and firmly bound unto the United States of America,

in the sum of Two Hundred Fifty ($250.00) Dollars, to the payment of which well and truly to be made we jointly and severally bind ourselves, our executors, administrators and successors, firmly by these presents.

WITNESS our hands and seals at Los Angeles, California, this 8th day of April, 1930.

WHEREAS, on the 2nd day of April, 1930, in the District Court of the United States for the Southern District of California, Central Division, an order was entered denying the defendant's motion for a new trial, and on said date sentence was pronounced on the said Herman F. Quirin, and on the 4th day of April, 1930, a citation was issued, directed to the United States of America, to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, pursuant to the terms and the date fixed in the said citation;

NOW, THEREFORE, the condition of the above obligation is such that if the said Herman F. Quirin shall prosecute said appeal and answer all damages for costs if he fail to make good his plea, then the above obligation shall be null and void; otherwise to remain in full force and effect.

Herman F. Quirin
Principal
Fidelity and Deposit Company
of Maryland
By W. M. Walker
Attorney-in-Fact
Theresa Fitzgibbons
Agent
Sureties

We, the undersigned, attorneys for the said Herman F. Quirin, hereby certify that in our opinion the form of the foregoing bond is correct, and that the sureties thereon are quaified.

C. L. Belt,
Mark L. Herron and
Russell Graham
By Russell Graham
Attorneys for Appellant Herman F. Quirin.

The foregoing bond is hereby approved as to form.
SAMUEL W. McNABB,
United States Attorney
By E. E. Doherty
Assistant United States Attorney.

The foregoing bond is hereby approved.
John M. Killits
U. S. District Judge.

STATE OF CALIFORNIA }
} ss.
County of Los Angeles }

On this 8th day of April, 1930, before me Elsie E. Armstrong, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared W. M. Walker and Theresa Fitzgibbons known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit

Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] Elsie E. Armstrong

Notary Public in and for the State of California, County of Los Angeles.

[Endorsed]: 9926-M United States of America vs. Peter Connley and Herman F. Quirin, Costs on Appeal Fidelity and Deposit Company of Maryland Baltimore F. D. Fidelity and Surety Bonds Burglary and Plate Glass Insurance. Filed Apr 10 1930 R. S. Zimmerman, Clerk By W. E. Gridley Deputy Clerk Department of Southern California Bank of America Building 650 S. Spring St. Los Angeles, Calif.

UNITED STATES OF AMERICA, Plaintiff	)	No. 9926-M
	)	BOND
vs	)	PENDING
	)	DECISION
PETER CONNLEY	)	UPON
Defendant	)	APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That we, PETER CONNLEY, of the City of Los Angeles, State of California, as principal, and the PACIFIC INDEMNITY COMPANY a California Corporation, with its principal office and place of business in Los Angeles, County of Los Angeles, State of California, as surety, are jointly and severally held and firmly bound unto the UNITED STATES OF AMERICA, in the sum of Twelve Thousand & no/100 ($12,000.00) Dollars

for the payment of which said sum we and each of us bind ourselves, our heirs, executors, administrators and assigns.

Signed and dated this 21st day of May, A. D. 1930.

WHEREAS, lately, to-wit: on or about the 27th day of March, A. D. 1930, at a term of the District Court of the United States, in and for the Southern District of California, Central Division, in an action pending in said Court, between the United States of America, Plaintiff, and PETER CONNLEY, defendant, a judgment and sentence was made, given rendered and entered against the said PETER CONNLEY in the above entitled action, wherein he was convicted on Counts No's. 1, 2, 3, 4 and 5 of said indictment to violate Section 37 of the Federal Penal Code, Conspiracy to Violate Section 3, Title 2, National Prohibition Act and Sections 3258, 3282 and 3281 United States Revised Statute, and Section 3, Title 2, National Prohibition Act.

WHEREAS, in said judgment and sentence, so made, given, rendered and entered against said PETER CONNLEY, he was by said judgment sentenced to six (6) years and six (6) months in the Federal Pententiary at McNeils Island, and to pay a fine aggregating $4,000.00. (Four Thousand & no/100 Dollars).

The said PETER CONNLEY, having obtained an appeal from the United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment and sentence, and a citation directed to the United States of America to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, in pursuance to the terms and at the time fixed in said citation.

WHEREAS, the said PETER CONNLEY has been admitted to bail pending the decision upon said appeal, in the sum of Twelve Thousand & no/100 ($12,000.00)

NOW, THEREFORE, the conditions of the above obligations are such that if the said PETER CONNLEY shall appear in person or by his attorney, in the United States Circuit Court of Appeals for the Ninth Circuit, on such day or days as may be appointed for the hearing of said cause in the said Court, and prosecute his appeal; and if the said PETER CONNLEY shall abide and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit, in said Cause; and if the said PETER CONNLEY shall surrender himself in execution of said judgment and sentence if the said judgment and sentence be affirmed by the United States Circuit Court of Appeals for the Ninth Circuit; and if the said PETER CONNLEY SHALL APPEAR for trial in the District Court of the United States in and for the Southern District of California, Central Division, on such day or days as may be appointed for retrial by said District Court, and abide by and obey all orders made by said District Court, if the said judgment and sentence against him be reversed by the United States Circuit Court of Appeals for the Ninth Circuit.

THEN THIS OBLIGATION TO BE void; otherwise to remain in full force, virtue and effect.

Peter F. Connolly 353 S. Cloverdale

Principal

PACIFIC INDEMNITY COMPANY

By F. L. Hemming

[Seal] Attorney-in-Fact SURETY

I hereby certify that I have examined the foregoing bond and that, in my opinion, the form thereof is proper and that the surety is qualified.

Russell Graham
Of Counsel for Appellant.

STATE OF CALIFORNIA,
ss.
County of LOS ANGELES

On this 21st day of May in the year one thousand nine-hundred and 30 before me, Chas. Malley a Notary Public in and for said County and State, residing therein, duly commissioned and sworn personally appeared F. L. Hemming known to me to be the duly authorized Attorney-in-Fact of PACIFIC INDEMNITY COMPANY, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Company, and the said F. L. Hemming acknowledged to me that he subscribed the name of PACIFIC INDEMNITY COMPANY, thereto as principal, and his own name as Attorney-in-Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] Chas. Malley
Notary Public in and for Los Angeles County, State of California

My Commission Expires Oct. 31, 1932.

[Endorsed]: 9926-M Cr. Bond Approved because of ruling of Circuit Court of Appeals Paul J. McCormick United States District Judge Filed May 21 1930 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

UNITED STATES OF AMERICA,	)	No. 9926-M
	)	
Plaintiff	)	BOND
vs	)	PENDING
	)	DECISION
HERMAN QUIRIN	)	UPON
Defendant	)	APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, HERMAN QUIRIN, of the City of Los Angeles, State of California, as principal, and the PACIFIC INDEMNITY COMPANY, a California Corporation, with its principal office and place of business in Los Angeles, County of Los Angeles, State of California, as surety, are jointly and severally held and firmly bound unto the UNITED STATES OF AMERICA, in the sum of Six Thousand & no/100 ($6,000.00) Dollars for the payment of which said sum we and each of us bind ourselves, our heirs, executors, administrators and assigns.

Signed and dated this 21st day of May, A. D. 1930.

WHEREAS, lately, to-wit: on or about the 27th day of March, A. D. 1930, at a term of the District Court of the United States, in and for the Southern District of California, Central Division, in an action pending in said Court, between the United States of America, Plaintiff, and HERMAN QUIRIN, defendant, a judgment and sentence was made, given, rendered and entered against the said HERMAN QUIRIN in the above entitled action, wherein he was convicted on Count 1 of said indictment to violate Section 37 of the Federal Penal Doce, Conspiracy to Violate Section 3, Title 2, National Prohibition Act and Sections 3258, 3282 and 3281 United States

Revised Statute, and Section 3, Title 2, National Prohibition Act.

WHEREAS, in said judgment and sentence, so made, given, rendered and entered against said HERMAN QUIRIN, he was by said judgment sentenced to Twenty-One (21) months in the Federal Penitentiary at McNeils Island, and to pay a fine aggregating One Thousand ($1,000.00) dollars.

The said HERMAN QUIRIN, having obtained an appeal from the United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment and sentence, and a citation directed to the United States of America to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, in pursuance to the terms and at the time fixed in said citation.

WHEREAS, the said HERMAN QUIRIN has been admitted to bail pending the decision upon said appeal, in the sum of Six Thousand & no/100 ($6,000.00) Dollars.

NOW, THEREFORE, the conditions of the above obligations are such that if the said HERMAN QUIRIN shall appear in person or by his attorney, in the United States Circuit Court of Appeals for the Ninth Circuit, on such day or days as may be appointed for the hearing of said cause in the said Court, and prosecute his appeal; and if the said HERMAN QUIRIN shall abide and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit, in said Cause; and if the said HERMAN QUIRIN shall surrender himself in execution of said judgment and sentence if the said judgment and sentence be affirmed by the United States Circuit Court of Appeals for the Ninth Circuit: and if the

said HERMAN QUIRIN shall appear for trial in the District Court of the United States in and for the Southern District of California, Central Division, on such day or days as may be appointed for retrial by said District Court, and abide by and obey all orders made by said District Court, if the said judgment and sentence against him be reversed by the United States Circuit Court of Appeals for the Ninth Circuit.

THEN THIS OBLIGATION TO BE VOID; otherwise to remain in full force, virtue and effect.

Herman Quirin, 706 East 90th

Principal

PACIFIC INDEMNITY COMPANY

By F. L. Hemming

[Seal] Attorney-in-Fact

I hereby certify that I have examined the foregoing bond and that, in my opinion, the form thereof is sufficient, and that the surety is qualified.

Russell Graham

Of Counsel for Appellant.

STATE OF CALIFORNIA

ss.

County of LOS ANGELES

On this 21st day of May in the year one thousand nine-hundred and 30, before me, Chas. Malley a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared F. L. Hemming known to me to be the duly authorized Attorney-in-Fact of PACIFIC INDEMNITY COMPANY, and the same person whose name is subscribed to the

within instrument as the Attorney-in-Fact of said Company, and the said F. L. Hemming acknowledged to me that he subscribed the name of PACIFIC INDEMNITY COMPANY, thereto as principal, and his own name as Attorney-in-Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] Chas. Malley

Notary Public in and for Los Angeles County, State of California

My Commission Expires Oct. 31, 1932.

[Endorsed]: 9926-M Cr. Bond approved because of ruling of Circuit Court of Appeals Paul J. McCormick United States District Judge Filed May 21 1930 R. S. Zimmerman, Clerk, By Edmund L. Smith, Deputy Clerk.

Praecipe

District Court of the United States
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, VS PETER CONNLEY and HERMAN F. QUIRIN, Defendants.	Clerk's Office No. 9926-M Crim.

To the Clerk of Said Court:

Sir:

Please prepare transcript of record to the Circuit Court of Appeals in the above entitled cause, and include therein the following papers and orders:

(1) Indictment
(2) Pleas
(3) Verdicts
(4) Minutes of trial
(5) Bill of Exceptions and Order approving same
(6) Petition for appeal
(7) Order allowing appeal and fixing bond
(8) Citation
(9) Stipulation re certification of exhibits to Circuit Court of Appeals
(10) Stipulation and Order extending time for filing transcript on appeal and docketing appeal
(11) Cost bonds on appeal
(12) Bail bonds on appeal
(13) Assignment of errors
(14) Judgments and Sentences
(15) Praecipe for record
(16) Order of court re certification of original exhibits to Circuit Court of Appeals
(17) Memorandum of Costs and Disbursements
(18) Amended Assignment of Errors.

C. L. Belt
Mark L. Herron
Russell Graham
Attorneys for Appellants.

[Endorsed]: No. 9926-M United States District Court Southern District of California United States of America, plaintiff vs Peter Connley and Herman F. Quirin, Defendants. Praecipe for Record—S. W. McNabb—J. Geo. Ohannesian Filed May 7, 1930 R. S. Zimmerman Clerk. By Edmund L. Smith, Deputy Clerk. Russell Graham, C. L. Belt, and Mark L. Herron, 650 South Spring St., Los Angeles, California. Attorneys for Defts.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,)
vs.)
)
PETER CONNLEY and)
HERMAN F. QUIRIN,)
Defendants.)

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 295 pages, numbered from 1 to 295 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; indictment; minutes of the court; verdict of the jury; sentence; bill of exceptions; petition for appeal; order allowing appeal; assignment of errors; amended assignment of errors; stipulation re exhibits; order re exhibits; memorandum of costs; bond of Peter Connley for costs; bond of Herman F. Quirin for costs; bonds pending decision on appeal and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to.....and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of May, in the year of Our Lord One Thousand Nine Hundred and Thirty, and of our Independence the One Hundred and Fifty-fourth.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 6124.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Peter Connley and Herman F. Quirin,
Appellants,

vs.

The United States of America,
Appellee.

OPENING BRIEF OF APPELLANTS.

MARK L. HERRON,
C. L. BELT,
RUSSELL GRAHAM,
Attorneys for Appellants.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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TABLE OF CASES AND AUTHORITIES CITED.

No. 6124.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Peter Connley and Herman F. Quirin,
Appellants,

vs.

The United States of America,
Appellee.

OPENING BRIEF OF APPELLANTS.

THE CHARGE, VERDICT AND SENTENCE.

The appellants, Peter Connley and Herman F. Quirin, together with Nick Bruno and Joe Verda were tried upon an indictment charging in six counts as follows:

1 A violation of section 37 of the Federal Penal Code, that is, a conspiracy to transport, manufacture and possess large quantities of intoxicating liquor in violation of the National Prohibition Act;

2 The unlawful manufacture for beverage purposes of about thirteen hundred gallons of intoxicating liquor, in violation of the National Prohibition Act;

3 The unlawful possession of a still and distilling apparatus which had not been registered with the Collector of Internal Revenue as required by law;

4 The unlawful engaging in and carrying on the business of a distiller without having given bond as required by law with intent to defraud the United States of America of the taxes on the spirits distilled;

5 The unlawful making and fermenting of mash fit for distillation and for the production of spirits on certain premises other than a distillery duly authorized by law;

6 The unlawful possession of about thirteen hundred gallons of intoxicating liquor in violation of the National Prohibition Act. [Tr. pp. 2-11]

Nick Bruno and Joe Verda were acquitted on all counts. The appellant, Peter Connley, was convicted on all counts. Appellant, Herman F. Quirin, was convicted on the first count charging conspiracy and acquitted on the remaining counts of the indictment.

A motion for a new trial on behalf of each of the appellants was made and denied. Sentence was thereupon imposed on Peter Connley as follows:

> "To be imprisoned in the United States penitentiary at McNeil Island, Washington, for the term and period of one year and two months on the first count; two years on the second count; one year and two months on the third count; one year and one month on the fourth count; and one year and one month on the fifth count; sentences to run consecutively, making a total sentence of six years and six months; and in addition thereto, pay a fine into the United States of America in the sum of $4000.00, and court costs taxed at $947.22, and with respect to the sixth count, it appearing that this does not involve imprisonment, but a maximum fine of $500.00,

> which the imposition of fine of $4000.00 aforesaid covers, it is the further judgment of the court that said defendant stand committed until said fine of $4000.00 and costs, shall have been paid." [Tr. pp. 39-40.]

The defendant, Herman F. Quirin, was sentenced to be imprisoned

> "in the United States Penitentiary at McNeil Island, Washington, for the term and period of twenty-one months on the first count, and in addition thereto, pay unto the United States of America, a fine in the sum of $1000.00 and court costs taxed at $947.22 and stand committed until said fine and costs shall have been paid." [Tr. p. 40.]

An exception was noted by each appellant to the sentence imposed upon him. [Tr. p. 40.]

STATEMENT OF FACTS.

The testimony showed that for several years preceding the trial the defendant Nick Bruno had been the owner of a small ranch in the hills in Riverside county near the highway between Elsinore and Perris, a portion of the ranch being used for the raising of grain, the remainder being occupied by goat corrals, sheds, and a dwelling house.

The defendant Quirin lived on lands adjoining the Bruno ranch and his dwelling house was located on the Perris-Elsinore highway out of sight of the Bruno ranch, the Quirin land lying between the Bruno ranch and the highway.

The ranch of Bruno was enclosed by a fence in which there were two gates, both gates giving access upon roads which connected with the Perris-Elsinore highway. The

road upon which the front gate opened forked a short distance away from that gate. The South fork led directly by and joined the Perris-Elsinore highway at a point but a few feet distance from the house of Herman Quirin. The North fork opened upon that highway, some three or four hundred yards north of the Quirin house. The road upon which the back gate opened led around a range of hills and opened upon the Perris-Elsinore highway at a point about a mile nearer Elsinore than the Quirin house and out of the range of vision from that house. A road skirting the boundary line of the ranch connected these two roads.

Some hundred feet from the Quirin house there was the shaft of an old mine, partially filled with water and timbered to below the water line.

On January 21, 1930, Prohibition Agents Clements and Alles visited the Bruno ranch and found at the house on that ranch Joe Verda and a man who first gave his name as Walker and who was later identified as appellant, Peter Connley. Agent Clements searched the house and found in an apparently disused and otherwise vacant room, a copper column for a still. (Government's Exhibit No. 15.) The dining table in the house was set for seven persons. The ranch had been recently planted to grain.

The agents then found a shed containing a number of distillate barrels, a buried distillate tank, and, following a road down a little hill, discovered a pit in which was located a large still completely set up and attached to a boiler set over distillate burners which were connected with the buried tank by a small pipe. In this pit there were seven large vats of fermenting mash, each

containing five or six thousand gallons. The pit itself was roofed over with heavy timbers, with the exception of an opening about three feet square, giving access to the pit by means of a ladder, and an opening over the boiler and over each vat so that the various ingredients of the mash could be emptied into the vats from above. The still comprised two large copper columns, both of which extended ten or twelve feet above the level of the ground. These columns were surrounded and entirely concealed by a wooden chamber which was in turn completely concealed by a stack of baled hay, the top of which stack was covered with corrugated iron. The timbers, roofing the still pit, were covered with dirt and were level with the surrounding ground. Covers were provided to conceal the openings above referred to. From a distance of a few feet, the entire plant looked like an ordinary hay stack, the still, the pit and the vats being invisible. So successful was this camouflage, that from the buried tank about one hundred feet from the hay stack, the officers were not aware that the hay stack was other than it seemed.

Taking Connley and Verda with them, the agents, after discovering the buried tank, followed a little road or path to the hay stack. When they arrived at the opening giving access to the pit, Agent Clements asked Connley what was down in the hole. According to Clements and Alles, Connley replied in substance:

> There is no use of you fellows coming down here. We can fix this up all right. I know the owner of the still and we can all make some money on it.

The agents, however, accompanied by Connley, went down into the pit, discovering the still and fermenting

mash, as hereinbefore described, the boiler of the still at that time being still warm. They also found five-gallon cans containing alcohol and some alcohol in a cooling tank. Coming out of the pit, the agents placed Connley and Verda under arrest.

At the time the agents arrived, there were two or three men working in a field near the Bruno house on a pipe-line or on some lumber. One of them got on a truck which was standing near the house and drove off; the others walked across the fields into the hills. Agent Clements asked Connley what his connections were and he said he had been there about ten days; that he was a contractor and was building a water tank. There was lumber there upon which he was working.

According to Clements, Connley then asked him if there wasn't some way he could fix this up; that there was no use in anyone going to jail; that there was too much money invested and that it would be easy for all of them to make money.

Clements, who had taken the license number of the truck, followed it to the Perris-Elsinore highway and saw it standing near the Quirin house. He removed the rotor from the distributor; ascertained there was no one in, near or about the Quirin house, and went on to Elsinore to call for additional officers. Returning to the Quirin house with the Chief of Police of Elsinore, he found the truck gone and the appellant, Herman Quirin, in his home shaving. As the officers entered Quirin's home, the following conversation ensued, according to Clements' testimony on direct examination:

Quirin asked, "What do you mean by coming in here?"

Clements: "I have come over after you."

Quiring: "What are you going to do? Take me over and set me on the spot?"

Clements asked what became of the truck and Quirin answered that the man who owned the truck took it away; that he had seen this man a few times; did not know him by name but knew him when he saw him.

Quirin was then taken to the Bruno ranch and the statement being made that the ranch belonged to one Nick Bruno, Chief Barber was sent to Elsinore, where he arrested Bruno in the act of delivering a carload of goats and brought him to the Bruno ranch, at which time a push button was found in the Bruno house which operated a bell in the still pit. This push button was concealed behind a board on the wall. Barber questioned Connley, who said his name was Walker and denied he had an automobile or had a driver's license. An examination of a Ford car standing near the Bruno house, disclosed it to be registered in the name of Peter Connley and to contain a driver's license in that name. Barber testified he had seen Connley driving this car in and about Elsinore several times. He testified that he had seen appellant, Herman Quirin, with Connley four or five times in Elsinore, and with Bruno three or four times, and had seen Bruno, Connley and Quirin together near Quirin's house while going along the highway.

Further investigation disclosed that a water pipe ran from the hereinabove mentioned mine shaft across the Bruno ranch to a reservoir near the Bruno house, from

which reservoir a buried pipe line lead to the still pit, and according to Chief Barber, a gasoline engine and pump was located some sixty to sixty-five feet down this shaft.

Prohibition Agent Spencer testified that he made an examination of the Bruno ranch and of the still and reservoir and so far as he could find there was no source of water supply for the still other than that which came from the reservoir. [Tr. p. 53.]

He made an investigation of the lumber that was used in the mine shaft and of the lumber that was used in the still pit. In the still pit he found 4x4s, 2x4s, two or three 2x12s, 8x8s, and several 6x6s. In the mine shaft he found some 2x2s, some 4x4s and some timbers that were about the size of, and might have been, 4x4s.

At the trial, N. W. Hotchkiss testified that he was manager of the Dill Lumber Company at Elsinore; was acquainted with the appellants, Connley and Quirin and defendant, Bruno. On a number of occasions up to January 21, 1930, he sold various orders of lumber to Quirin. On January 21, 1930, Connley and Quirin came together to his place of business and purchased an order of lumber. This order was not paid for, but on January 22, 1930, (being the day after the arrest of defendants), the witness saw the lumber piled up on the Bruno ranch and brought it back to the lumber yard. Much of the lumber so purchased at these various times was used in the construction of an addition to the Quirin house on the highway. The witness examined the lumber used in the timbering and roofing of the still and testified that ninety-five per cent of the lumber of the frame work of the pit was not lumber which he had sold to Quirin, but that the

other five per cent of the lumber he saw might have been part of the lumber he sold to Quirin, but that he could not say it was. The only pieces that corresponded in size to lumber he sold to Quirin were 2x12s and approximately twenty pieces of 4x4s.

Richard Kelly, the proprietor of the Kelly Boiler Works, testified that he had an account on his books under the name of P. Walker; that he had only seen Walker, who was a heavy set man, about thirty years old, weighing about two hundred pounds or more, a couple of times; that three or four men ordered material on this account, which was opened when they ordered a 30 H. P. boiler about a year before the trial; that he, Kelly, was present when the tubings were sold for the first boiler, but that he did not remember the appearance of the man to whom he sold it.

The books of the Kelly Boiler Works, introduced through Fred R. Ranney, Kelly's book keeper, contained entries of the account of P. Walker, 916 West 3rd, showing a sale to P. Walker on July 25, 1929, of one 48-inch x8 foot vertical boiler with certain fittings. Another entry showed a sale to P. Walker on August 1, 1929, of two single cylinder pumps. There were various other entries, the last one on December 11, 1929, showing a sale of sixteen 2x6 tubings, one 2-inch tube expander and certain labor, including that of Pete Valero, for repair of boiler, which will be referred to hereafter. According to Prohibition Agent Spencer, he discovered near the still both new and old tubing about two inches in diameter and six feet long.

Kelly further testified that in the month of July, 1929, P. Walker and some other men came to the Kelly Boiler Works and wanted to purchase a 40 H. P. boiler on terms. Kelly, not having one on hand, accompanied them to the Thompson Boiler Works and talked to Russell Thompson about the matter, but Thompson was not willing to let the boiler go on credit. Kelly, seeing that he could not arrange a credit sale, left and the customers thereupon purchased a 40 H. P. Thompson boiler and paid cash therefor. The Thompson employees loaded the boiler on the truck of the purchasers, who thereupon drove away. Kelly's testimony was corroborated by that of Russell Thompson, who further testified that the name "Thompson Boiler Works" appeared on the combustion chamber and the water column of the boiler sold, and identified Government's Exhibit 18 (the boiler set up in the still pit) as a photograph of the boiler sold by him.

Kelly was later recalled, the jury was excused and after being severely grilled by the court in a manner which will be hereafter pointed out in detail, the jury was recalled to the box and the witness stated that the appellant, Connley, looked more like the P. Walker with whom he had done business than any one else in the court room. Whereupon, the court, out of the hearing of the jury, but in the presence of Charles Kruse, another government witness, and an employee of Kelly, directed the marshal to retain Kelly in his custody.

The witness, Charles Kruse, testified he was an employee of the Kelly Boiler Works in January, 1930, and during that month saw appellant, Connley and Nick Bruno at that plant on an occasion when a rush order came to

get out some 2-inch flues, several employees, including Pete Valero and the witness' brother, Albert Kruse, being at the plant. He testified that Connley and Bruno loaded the flues on a truck, and it departed, taking Pete Valero with it.

His identification of Bruno was controverted by the stipulation [Tr. p. 197] to the effect that a man named Bryant, if called to the witness stand on behalf of the defendant, Nick Bruno, would testify that during the entire month of December, 1929, he was with the defendant Bruno; and that Bruno and he, Bryant, were attending Mr. Bruno's goats in Cottonwood Canyon, some ten miles from the Bruno ranch; that Mr. Bruno was there continuously with him, Bryant, during that entire month and did not leave that ranch for any purpose and did not come to Los Angeles for the purpose of visiting the Kelly Boiler Works or for any other purpose, and was further controverted by the testimony of Bruno, who took the stand on his own behalf, and of whose truthfulness the jury bore witness by its verdict. Bruno testified:

> "I never went to a place in Los Angeles called the Kelly Boiler Works. I don't know where it is at, this place. All during the month of December, 1929, I was in Cottonwood Canyon. At that time I had 800 goats, and during the entire month I was there in that canyon. I was in that canyon for six months. I had a fellow in there helping me named Bill Bryant. I am very certain that at no time did I go with anyone to a place called the Kelly Boiler Works. Them months I used to go up and down the hills. We chased all the goats in the canyon, because it was cold, rain and we had a hard time to drive the goats down to the corral. I was living in that little cook wagon. There was no house there, and when

> we find no house we sleep in the cook. In the month of December I did not go to Los Angeles at all. I see that copper utensil that sets in the back of the courtroom there. The first time I saw it was here in the courtroom." [Tr. pp. 218-219.]

Valero testified that on December 11, 1929, he was sent out into the country to do some work, taking fifteen boiler tubes with him, and identified the picture of Bruno's ranch as the place to which he was taken. He descended to the still pit; saw a boiler and several tanks full of some kind of liquid, but did not work on the boiler, as it had a very small man hole and he was too large. He stayed all night in the pit and at six o'clock A. M. was taken back to Los Angeles. He identified Connley as one of the men he had seen in the still pit and stated that that was the first time he had seen him. He did not recognize the driver of the truck on which he was taken to the ranch.

Albert Kruse, an employee of the Kelly Boiler Works for about two years, testified that he was taken to the Bruno ranch after the raid and saw a boiler base which he had helped put together and a boiler similar to one which had been sold by the Kelly Boiler Works. There were no special marks on the boiler, however, and he could not identify it as the one which had been sold. He testified he had seen the man to whom the boiler had been sold in the office of the Kelly Boiler Works two or three times talking with Kelly and the bookkeeper; had seen him walk from his car to the office. He testified that he didn't pay any particular attention and further stated "from the witness stand it appears to me like this man between the two gentlemen in gray," indicating the appellant, Connley.

The Government sought to show that appellant, Quirin, as well as Bruno and Verda, had either helped in the installation of the still, or in planting the fields to grain in order the better to conceal it. In this connection, Fred C. Amsbaw testified that he lived near Elsinore; that he knew Nick Bruno, who had rented a team from him and that on another occasion Bruno came with Quirin to rent a team from the witness; that Bruno said he would stand good for the team and said he had been digging a hole and wanted to level some dirt; that Quirin paid for the team, which was later returned by a boy. This witness testified that he did not see this team at work at any time that he was on the Bruno ranch, but did see that some trees had been dug up at a place where the still was later found to be.

Testimony was introduced by the Government to show, and both Verda and Bruno admitted that for two or three days preceding the arrest of defendant, Bruno and Verda were engaged in planting grain with a grain drill rented from a man by the name of Wagoner. The circumstances under which this work was done, being according to Verda as follows: That he had been employed by one Frank Romero to do farm work on the Bruno ranch and was to receive thirty dollars per month and board, and was taken by Romero to the ranch and given some groceries. The next day Bruno brought a grain drill to the ranch, late in the afternoon. The following two days Bruno and Verda worked at planting grain. On the third day they completed the work and Bruno left with the team and grain drill. That Romero and Connley came to the Bruno ranch Tuesday morning; that a big truck brought some lumber there; that he heard Connley

and Romero discussing the making of a foundation for a tank near the reservoir; that they moved the lumber in and started to work. Whereupon the Federal officers arrived. That Romero was there at the time the officers came and was one of the men who went across the fields and over the hills and escaped. That the only other man that he saw there whom he knew was the defendant, Connley, who gave the officers the name of George Walker. [Tr. p. 201.]

Nick Bruno testified that he was the owner of the ranch known as the Bruno ranch. That he was a goat herder and raised goats and hay on the ranch. That in July, 1929, a man named Romerez, sometimes known as Romero, and two or three men came to his ranch and leased the ranch for a year for a rental of $400.00, stating that they wished to plant alfalfa, to drill a well and install pumps to irrigate it. That after the lease had been signed, he moved away from the ranch and moved his goats to another location. That he did not return to the ranch until about January 18, 1930, when at Romerez's request, he came with a team and grain drill, and together with Verda planted grain, discovering in the course of the last day of planting that the still was there located. That he knew Quirin, who lived near the Perris-Elsinore highway and that Quirin's house had been built about a year and a half before the arrest and that an addition had been built on it within the past four or five months. That before he leased his ranch he had seen the old mine pit but that there was no lumber in it then, and that there was no pipe line on the reservoir on the Bruno ranch.

L. L. Mathews testified that in the latter part of July or the early part of August he had a conversation with Quirin, which conversation took place about three-quarters of a mile west of the Bruno house, Quirin coming to where the witness was looking at a piece of Government land, and asking if the witness had seen an old mule. The witness answered that he had not, and, seeing a pile of dirt down by Bruno's house, asked what they were building down there, to which the defendant Quirin answered they were building a cheese factory down there.

CONTENTIONS OF APPELLANTS.

Appellants contend:

1. That the third count of the indictment does not state facts sufficient to constitute any offense against the United States.

2. That the offenses charged and attempted to be charged in the second, third, fifth and sixth counts of the indictment are component parts of, and necessarily included in, the offense charged in the fourth count of the indictment, and sentences on each of said second, third, fourth and sixth counts, to run consecutively constitute double jeopardy and result in five different punishments for the one inclusive offense.

3. That the court was guilty of misconduct prejudicial to the rights of appellants in its examination of the witness Kelly.

4. That the court erred in refusing to allow counsel for the defendants, or any of them, to interrogate the witness Kelly out of the presence of the jury, after the court had examined him out of the presence of the jury.

5. That the court erred in limiting the cross-examination of the plaintiff's witness, Albert Kruse.

6. That the court erred in admitting in evidence the written statement of the witness Amsbaw, and in commenting on the contents thereof and was guilty of misconduct in its examination of this witness.

7. That the court erred in denying the motion of the appellant Quirin for a directed verdict of not guilty, made at the conclusion of the Government's testimony and renewed after the defendants had rested.

8. That the United States Attorney was guilty of misconduct in his argument to the jury, which misconduct was prejudicial to the rights of appellants.

9. That the court misdirected the jury.

These contentions are based upon the assignment of errors appearing in appendix "D" of this brief and in the transcript of record at pages 270-275.

ARGUMENT.

1. The Third Count of the Indictment Does Not State Facts Sufficient to Constitute Any Offense Against the United States.

The third count of the indictment charges as follows:

> "That the defendants * * * did knowingly, wilfully, unlawfully and feloniously, have in their possession and custody and under their control, one still and distilling apparatus set up at or near the said ranch of Nick Bruno, the legal description of which is as follows, to-wit * * * which said still and distilling apparatus had not been registered by the said defendants with the Collector of Internal Revenue for the Sixth Internal Revenue District of

California, and the said defendants, at the time they did so knowingly, wilfully, unlawfully and feloniously have in their possession and custody and under their control the said still and distilling apparatus, then and there well knew that the said still and distilling apparatus had not been registered with the said Collector of Internal Revenue as required by law. [Tr. p. 7.]

This charge is laid under R. S. Sec. 3258, 26 U. S. C. A. 281, which provides:

> Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is, by subscribing and filing with him duplicate statements, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used; one of which statements shall be retained and preserved by the collector, and the other transmitted by him to the Commissioner of Internal Revenue. Stills and distilling apparatus shall be registered immediately upon their being set up. Every still or distilling apparatus not so registered, together with all personal property in the possession or custody, or under the control of such person, and found in the building, or in any yard or inclosure connected with the building in which the same may be set up, shall be forfeited. And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years. (R. S. 3258.)

This act was derived from the Act of July 20, 1868, Chap. 186, Par. 5, 15 Stat. 126, and the Act of December 24, 1872, Chap. 13, Pars. 1 and 2, 17 Stat. 401-402.

This act was repealed by the National Prohibition Act,

U. S. v. Stafoff, 260 U. S. 477;

67 L. Ed. 358;

U. S. v. Yuginovich, 256 U. S. 450, 65 L. Ed. 1043;

and was reenacted by the Supplemental Act of 1921, 42 Stat. 223, 27 U. S. C. A., Par. 3, as follows:

> All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force on October 28, 1919, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of this title; but if any act is a violation of any of such laws and also of this title, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. (Nov. 23, 1921, c. 134, Sec. 5, 42 Stat. 223.)
>
> *U. S. v. Stafoff, supra.*

By the Act of March 3, 1927, C. 348, Par. 1, 5 U. S. C. A. 281, it is provided that "there shall be in the department of the Treasury * * * a Bureau to be known as the Bureau of Prohibition * * * the Commissioner of Prohibition shall be at the head of the Bureau of Prohibition * * *."

5 U. S. C. A., Sec. 281 C, is as follows:

> The rights, privileges, powers, and duties conferred or imposed upon the Commissioner of Internal Revenue and his assistants, agents, and inspectors, by any law in respect of the taxation, importation, exportation, transportation, manufacture, production, compounding, sale, exchange, dispensing, giving away, possession, or use of beverages, intoxicating liquors, or narcotic drugs, or by Title 27, or any other law relating to the enforcement of the eighteenth amendment, are hereby transferred to, and

conferred and imposed upon, the Secretary of the Treasury.

> The Secretary of the Treasury is authorized to confer or impose any of such rights, privileges, powers, and duties upon the Commissioner of Prohibition, or any of the officers or employees of the Bureau of Prohibition, and to confer or impose upon the Commissioner of Internal Revenue, or any of the officers or employees of the Bureau of Internal Revenue, any of such rights, privileges, powers, and duties which, in the opinion of the Secretary, may be necessary in connection with internal revenue taxes. (Mar. 3, 1927, c. 348, Sec. 4, 44 Stat. 1382.)

Article 18 of Regulation 3 promulgated by the Secretary of the Treasury on October 1, 1927, requires:

> Proprietors * * * distillers or all others who set up stills to register them with the Prohibition Administrator.

It will be seen that the effect of the Reorganization Act (5 U. S. C. A. 281 and 281 c) *supra,* was to impose upon the Secretary of the Treasury and the officers whom he should designate, the duty of accepting the registration of stills theretofore by 26 U. S. C. A. 281 imposed upon the Collector of Internal Revenue.

In consequence, as, after the passage of the Reorganization Act, it was no longer required that one in the possession, custody or control of a still which had been set up, register it with the Collector of Internal Revenue, a failure so to register such a still is no offense and an indictment charging such a failure and not charging a failure to register such a still with the Prohibition Administrator states no offense.

U. S. v. Dibella, 28 Fed. (2nd) 805 (C. C. A. 2nd);
U. S. v. Lecato, 29 Fed. (2nd) 694 (C. C. A. 2nd).

The court in the Lecato case stating:

> The indictment was in six counts, of which the first three charged the defendants with having in their possession a still not registered with the Collector of Internal Revenue, one count covering each of three separate stills. * * * Revised Statutes, 3258 (26 U. S. C. A. 281), is still in force, but by section 281c (5 U. S. C. A.) of the Prohibition "Reorganization Act" the duties imposed by it upon collectors have devolved upon the Secretary of the Treasury, who may distribute them as he thinks fit. By article 18 of Prohibition Regulation 3, the Secretary has imposed them upon prohibition administrators. It is therefore no longer a crime to possess a still not registered with the collector of the district, if it be properly registered with the administrator.

The rule laid down in the Lecato case was approved and followed by this court in

Silva v. U. S., 35 Fed. (2nd) 598.

2. The Offenses Charged and Attempted to Be Charged in the Second, Third, Fifth and Sixth Counts of the Indictment Are Component Parts of and Necessarily Included in the Offense Charged in the Fourth Count of the Indictment, and Sentences on Each of Said Second, Third, Fourth and Sixth Counts, to Run Consecutively, Constitute Double Jeopardy and Result in Five Different Punishments for the One Inclusive Offense.

The second count of the indictment charges that the defendants

> "on or about the 20th day of January, A. D. 1930, at the ranch of Nick Bruno * * * did knowingly, wilfully, unlawfully and feloniously manufacture for beverage purposes about thirteen hundred (1300) gallons of intoxicating liquor, the exact amount be-

ing to the grand jurors unknown, then and there containing alcohol in excess of one-half of one per cent by volume, in violation of section 3, Title II of the National Prohibition Act of October 28th, 1919, as amended March 2nd, 1929." [Tr. p. 6.]

The third count of the indictment charges:

"that the defendants on or about the 21st day of January, A. D. 1930, at the ranch of Nick Bruno did knowingly, wilfully, unlawfully and feloniously have in their possession and custody and under their control, one still and distilling apparatus set up at or near the said ranch of Nick Bruno, the legal description of which is as follows, to-wit * * * which said still and distilling apparatus had not been registered by the said defendants with the Collector of Internal Revenue for the Sixth Internal Revenue District of California, and the said defendants, at the time they did so knowingly, wilfully, unlawfully and feloniously have in their possession and custody and under their control the said still and distilling apparatus, then and there well knew that the said still and distilling apparatus had not been registered with the said Collector of Internal Revenue as required by law. [Tr. p. 7.]

The fourth count of the indictment charges that the defendants

"on or about the 21st day of January, A. D. 1930, at the ranch of Nick Bruno * * * did knowingly, wilfully, unlawfully and feloniously engage in and carry on the business of distillers without having given bond, as required by law, with the intent on the part of them, the said defendants, to defraud the United States of America of the tax on the spirits distilled by them, the said defendants, in violation of section 3281, United States Revised Statutes." [Tr. p. 8.]

The fifth count of the indictment charges that the defendants

> "on or about the 21st day of January, A. D. 1930, * * * did knowingly, wilfully, unlawfully and feloniously make and ferment on certain premises other than a distillery, and in a certain building other than a distillery duly authorized accordingly to law, to-wit: on the ranch of Nick Bruno * * * about fifty thousand (50,000) gallons of mash, which said mash was then and there fit for distillation and for the production of spirits, and which said mash was not then and there intended to be used in the manufacture of vinegar exclusively or at all; in violation of section 3282, United States Revised Statutes." [Tr. p. 9.]

The sixth count of the indictment charges that the defendants

> "on or about the 21st day of January, A. D. 1930, at the ranch of Nick Bruno * * * did knowingly, wilfully and unlawfully have in their possession about thirteen hundred (1300) gallons of intoxicating liquor, then and there containing alcohol in excess of one-half of one per cent by volume, for beverage purposes; in violation of section 3, Title II, of the National Prohibition Act of October 28, 1919." [Tr. p. 10.]

The appellants having been convicted and sentenced under the fourth count of the indictment, which charges that they unlawfully engaged in and carried on the business of distillers without having given bond as required by law, were thereby convicted of and sentenced for each act necessarily included within the definition of that offense.

In the case of *Ex Parte Nielsen,* 131 U. S. 176, 33 L. Ed. 118, two indictments were found against the peti-

tioner on the same day. The first charged that on the 15th of October, 1885, and continuously from that time till the 13th of May, 1888, in the territory of Utah, he, the said Nielsen did unlawfully claim, live and cohabit with more than one woman as his wives. To this indictment Nielsen pleaded guilty and was sentenced to imprisonment in the penitentiary and the payment of a fine.

The second indictment charged that said Nielsen on the 14th of May, 1888, at the same place, did unlawfully and feloniously commit adultery with one Caroline Nielsen, he being a married man and having a lawful wife and not being married to said Caroline. The said Caroline Nielsen was one of those women named in the first indictment. After suffering the penalty imposed by the sentence for unlawful cohabitation, the indictment for adultery came on for trial on Nielsen's plea of not guilty and former conviction by reason of his conviction for unlawful cohabitation.

To this plea of former conviction the district attorney demurred, the demurrer was sustained and the petitioner was convicted on his plea of not guilty. He thereupon petitioned the District Court for a writ of habeas corpus, which was refused. The appeal was from the order refusing that writ.

The court held that the adultery charged in the second indictment was an incident to and a part of the unlawful cohabitation charged in the first indictment. That cohabitation meant living together as man and wife, which included sexual intercourse, and this was the integral part of the adultery charged in the second indictment and was covered by, and included in, the first indictment and conviction. The court saying:

> "The conviction on that indictment was in law a conviction of a crime which was continuous, extending over the whole period including the time when the adultery was alleged to have been committed. The petitioner's sentence and the punishment he underwent on the first indictment was for that entire continuous crime. It included the adultery charged. To convict and punish him for that also was a second conviction and punishment for the same offense."

In the case at bar the offense of unlawfully engaging in and carrying on the business of distillers without having given bond as required by law is a continuing offense. In order to determine whether or not the offenses charged in the second, third, fifth and sixth counts are incident to and necessarily included in this offense, it is necessary to determine what the business of a distiller is.

Section 3247, R. S. (26 U. S. C. A. #241), provides:

> "Every person who produces distilled spirits, or who brews or makes mash, wort, or wash, fit for distillation or for the production of spirits, or who, by any process of evaporization separates alcoholic spirit from any fermented substance, or who, making or keeping mash, wort, or wash, has also in his possession or use a still, shall be regarded as a distiller."

In other words, every person who does the acts charged in counts 2, 3, 5 and 6, is by this statute declared to be a distiller.

In *Motlow v. U. S.*, 35 F. (2nd) 90, (C. C. A., 8th), the court held that a distilling company which had ceased the manufacture of liquor but which still maintained its warehouse, in which it stored and out of which it sold liquor formerly manufactured by it was still carrying on the business of a distiller, saying:

> "It goes without saying that warehousing and selling of whiskey is as much a part of a distiller's business as is the actual production of whiskey, and the question naturally arises, if the company was not a distiller during the period it was holding this whiskey in the warehouse, after it had ceased distilling, in what capacity was it holding the whiskey?"

The business of a distiller is to distill intoxicating liquor, which cannot be done without both possessing a still and fermenting mash to distill therein; neither can such a business be conducted without possessing the liquor after it has been so distilled.

It follows as a necessary result of the doctrine of the Nielsen case, *supra,* that appellant Connley having been convicted for the continuing offense, of "engaging in the business of distillers" and sentenced therefor, was by that conviction and that sentence, convicted and sentenced as for every act necessary to constitute that offense.

In *Tritico v. United States,* 4 Fed. (2d) 664 (C. C. A. 5th) in an indictment in three counts for violation of the National Prohibition Act, the defendants were charged, in the first count with the unlawful possession of intoxicating liquor, in the second with the unlawful possession of property designed for the manufacture of liquor, and in the third count with the unlawful manufacture of liquor. Defendants were convicted on all counts. A general sentence without reference to counts imposed a greater punishment than the law authorized as for any one count. Considering the contention of appellant that the sentence imposed constituted double jeopardy the court quoted from the Nielsen case, *supra,* saying:

"In the Nielsen case * * * it is said: 'Where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.'

'Applying this well-established rule to the indictment in this case, it must be apparent at once that proof of possession of distillery apparatus would necessarily have to be included in order to prove the manufacture of liquor, because such manufacture would otherwise be impossible. Likewise the same evidence which proved manufacture of liquor proved possession of it, because, upon the manufacture being completed, the liquor necessarily came into the control or possession of the manufacturer. It can make no difference whether separate charges are tried together or at different times. If the defendants had been tried for manufacturing liquor, thy could not afterwards have been prosecuted for possessing the apparatus necessary for such manufacture or for possessing the liquor so manufactured. It is true that evidence of possession of apparatus would not be required to prove possession of liquor, and vice versa, so that convictions could be had upon both the first and second counts. It is likewise true that a conviction under either the first or second count would not prevent a conviction under the third count, because proof of manufacture requires additional evidence. But these results do not militate against the conclusion that a conviction under the third count for manufacture would bar a prosecution under the first or the second count for unlawful possession of apparatus or liquor. Reynolds v. United States (C. C. A.) 280 F. 1; Morgan v. United States (C. C. A.) 294 F. 82. The conclusion is that the sentence is excessive.' "

To the same effect is:

Goetz v. United States, 39 Fed. (2d) 903, (C. C. A. 5th).

In *Cain v. United States,* 19 Fed. (2d) 472 (C. C. A. 8th), the indictment was in two counts, one charging the unlawful sale of morphine, the other the unlawful sending of morphine through the mail. The evidence showed a sale by the defendant and a delivery by mail. On appeal, the court held that but one offense had been committed and that a delivery is a necessary element of a sale, and that inasmuch as the delivery was necessarily included in the sale, a sentence on both counts constituted double jeopardy.

In *Miller v. United States,* 300 Fed. 529, 534 (C. C. A. 6th) it was held that on a charge of sale and possession of intoxicating liquor where the only possession was that shown by the act of sale, the offense of possession was necessarily included in and merged in the offense of sale. See also:

People v. Painetti, 80 Cal. Dec. 21;
United States v. Buckner, 37 Fed. (2d) 378;
Brady v. United States, 24 Fed. (2d) 399;
United States v. Weiss, 293 Fed. 992;
Murphy v. United States, 285 Fed. 801;
Braden v. United States, 270 Fed. 441;
16 *Corpus Juris,* 264.

The appellants respectfully contend that the acts charged in the second, third, fifth and sixth counts, when taken together constitute the offense charged in the fourth count and therefore merge therein.

3. The Court Was Guilty of Misconduct Prejudicial to the Rights of Appellants in Its Examination of the Witness Kelly.

On March 19, 1930, Richard Kelly was called as a witness for the Government. He was examined, excused and on March 25th, 1930, recalled by the Government. The substance and manner of his examination and the attitude of the court throughout it were, in the opinion of counsel, so prejudicial that we have appended to this brief, marked "Appendix A," all of those portions of the record bearing upon it.

We set this testimony out largely by question and answer, rather than in narrative form, both in our bill of exceptions and in our brief, because it seemed to us to be the only way in which the attitude of the trial judge could be made plain to this Honorable Court.

It seems scarcely possible that the Government will contend that the court did not commit grave error in the relentless, merciless and savage grilling of this old man, as disclosed by the record set out in Appendix A.

The court began its inquisition by the ominous admonition to the witness "to get his memory in shape to identify that man if he is in the court room," followed it by the statement that the witness was "bound to come through if it is possible," and ended this anomolous proceeding by an order for the arrest of the witness [Tr. pp. 28, 29 and 107] apparently for the reason that the witness had only partially yielded to the terrorism inspired by the court.

The only ground on which any party is ever permitted to cross-examine his own witness is on the ground of surprise, when that witness has given testimony contrary to

that expected by and adverse to the interests of the party producing him, and it is only after the laying of a proper foundation showing such surprise that such cross-examination is permitted.

> *Sullivan v. United States,* 28 F. (2d) 147 (C. C. A. 9th).

And it necessarily follows that what the prosecuting attorney may not do, the court may not do for him. Indeed the court is more strictly limited than is the prosecuting officer for, as was said in *Adler v. United States,* 182 Fed. 464 (C. C. A. 5):

> "A cross-examination that would be unobjectionable when conducted by the prosecuting attorney might unduly prejudice the defendant when it is conducted by the trial judge."

There was no showing that the Government was surprised by the testimony of its witness, Kelly, the United States attorney merely making the meager statement that he was "somewhat surprised with the testimony given by the witness in some respects" immediately preceding his so-called "continued direct testimony." [Tr. p. 87.]

In the case of *Sullivan v. United States, Supra,* this court said:

> "* * * In any event a party cannot claim to be surprised by the testimony of a witness, when he has failed to make inquiry as to what the testimony will be before calling the witness to the stand."

The record fails to show that the prosecuting attorney ever asked Kelly, before he was called to the witness stand, if he could identify Connley as the man with whom he had done business.

We respectfully ask this court to note that although the whole purpose and object of the court's examination was to impel an identification of Connley as the person with whom Kelly had dealt, the first time Mr. Kelly was called to the stand by the Government he was not asked whether he could or could not identify Connley as that man.

Can one be surprised by an answer he has not had?

The omission to ask Kelly, upon his first appearance upon the stand, if he could identify Connley, can only have resulted from an oversight on the part of counsel for the Government, or from a fear that if the question were asked the witness would state he could not do so. Either reason negatives surprise.

Moreover, whatever may have been the situation at the time the United States attorney announced he was "somewhat surprised," surely he was not still suffering from surprise six days later when Kelly was recalled to the stand, particularly in view of the fact that Kelly's testimony had, in the interim, been in large part corroborated by that of Government's witness, Thompson [Tr. pp. 137, 139, 142, 143, 144, 145] and the testimony of Fred R. Ranney. [Tr. pp. 175, 177.]

Even upon his recalling of Kelly to the witness stand, he did not ask Kelly whether or not he could identify Connley and thereafter cross-examine upon such answer as he might give. On the contrary, both court and counsel *assumed* he would testify that he could not make such identification, and the effort of court and counsel was clearly directed to the end of forcing an identification rather than to the lawful end, in a proper case, of re-

lieving the government of the burden imposed upon it by a witness who had testified differently than he had led the Government to expect.

Appellants feel that it is needless for counsel to dwell upon the dangers of testimony extorted by what proved to be the well justified fear of imprisonment on the part of Kelly. It had been their belief, until confronted by the facts of this case, that extorting of testimony by fear of, or by actual imprisonment, had been, for universally accepted reasons of public policy, discarded following the close of the middle ages.

If it be admitted that a judge—because he conceives that a witness knows more than he is telling, or fears that the answer to a question involving identification, may not result in the pointing out of the defendant,—may excuse the jury and wring reluctant, uncertain and "tentative" [Tr. p. 97] identification from a witness frightened by the statements of the court, the striking by the judge of the bench with his fist, and the sarcastic admonitions, to defendants' counsel, to get a moving picture machine to record the judge's actions and attitude [Tr. p. 95], of what practical value is defendant's constitutional right to be confronted by the witnesses against him? No one will, we feel, assert that a judge would have power to bar the testimony of an otherwise competent witness because, for reasons best known to the court, he did not fancy his testimony. Yet we can perceive no difference in principle between such an act and the power which the court here assumed. This assumed power was particularly dangerous, directed, as it was in the case at bar, at a man sixty-eight years of age who had just arisen from a sick bed. [Tr. p. 81.]

Counsel have diligently searched to find a similar case dealt with by our courts, but the departure in this case from any recorded instance of court procedure is so wide that this precise situation seems never to have been passed upon by reviewing courts.

A situation, differing upon the facts, but similar in principle, was considered by the Circuit Court for the Eighth Circuit in *Glover v. United States,* 147 Fed. 426, in which the court said:

> "To further illustrate the spirit of dealing with the defendant's witnesses, when the witness Solomon was on the stand, who had testified very positively as to the place where he saw the defendant on or about the time of the alleged robbery, and whose testimony, if unimpeached, was of the highest value, to the defendant, the court, as if to break the force of his testimony, took the witness in hand and catechised him as follows:
>
> 'Solomon, the court asks you whether you are absolutely sure and certain that this defendant was there at the school celebration on the 27th; if you are mistaken you can correct your statement yet, but if you are absolutely certain say so; but think a moment and see whether or not you are mistaken about it. If you are mistaken correct your statement; if you are not, why just say it out. Perhaps you might be mistaken; the court doesn't know; but the court wants to have you remember everything properly and truthfully, and if there is any doubt in your mind, make your correction; if there is any doubt in your mind that this defendant was not there; men sometimes are mistaken; just think about it and deliberate about it, and correct your statement if you are mistaken.'
>
> This bears on its face its own comment."

A situation more clearly resembling the one in the case at bar is found in the case of *Adler v. United States, supra.* The court saying:

"The record showed that the trial judge cross-examined the defendant's witnesses at length, his cross-examinations supplementing the cross-examinations of the district attorney and the special counsel for the Government, and in some instances exceeding theirs in length. These examinations by the judge were critical and apparently hostile to the witnesses. They led to many objections by defendant's attorneys and to spirited controversies between the attorneys and the judge."

After setting forth some of the questions propounded by the court and some of the controversies between the trial court and counsel, the court said:

"The trial judge, under the federal system, is not only permitted, but it is his duty, to participate directly in the trial, and to facilitate its orderly progress and clear the path of petty obstructions. It is his duty to shorten unimportant preliminaries, and to discourage dilatory tactics of counsel. The purpose of the trial is to arrive at the truth, and without unnecessary waste of time. In performing his duties, it may become necessary to shorten the examination of witnesses by counsel, and there is no reason why the judge should not propound questions to witnesses when it becomes essential to the development of the facts of the case. This is a matter within the discretion of the court, with which we would be reluctant to interfere. But the conduct of the judge, in the performance of all his duties, should appear to be impartial. The impartiality of the judge—his avoidance of the appearance of becoming the advocate of either one side or the other of the pending controversy which is required by the conflict of the evidence to be finally submitted to the jury—is a fundamental and essential rule of especial importance in criminal cases. The importance and power of his office, and the theory and rule requiring impartial conduct on his part, make his slightest action of great weight with the jury. While we are of opinion that the judge is permitted to take part impartially in the examination or cross-

examination of witnesses, we can readily see that, if he takes upon himself the burden of the cross-examination of defendant's witnesses, when the government is represented by competent attorneys, and conducts the examination in a manner hostile to the defendant and the witnesses, the impression would probably be produced on the minds of the jury that the judge was of the fixed opinion that the defendant was guilty and should be convicted. This would not be fair to the defendant, for he is entitled to the benefit of the presumption of innocence by both judge and jury till his guilt is proved. If the jury is inadvertently led to believe that the judge does not regard that presumption, they may also disregard it.

A cross-examination that would be unobjectionable when conducted by the prosecuting attorney might unduly prejudice the defendant when it is conducted by the trial judge. Besides, the defendant's counsel is placed at a disadvantage, as they might hesitate to make objections and reserve exceptions to the judge's examination, because, if they make objections, unlike the effect of their objections to questions by opposing counsel, it will appear to the jury that there is direct conflict between them and the court. If it were the function of the judge in this country, as it is in some foreign tribunals, to perform the duties incumbent here on the district attorney, the impression produced on the minds of the jury against the defendant would not be so inevitable. Counsel are expected to maintain an attitude of respect and deference toward the judge, and this attitude is maintained without difficulty when the judge confines his activities to the usual judicial duties. And the judge can more easily treat counsel with the respect due an officer of the court in the performance of a duty, if he avoids the performance of the duties incumbent properly upon an attorney representing one side of the case. The evidence, taken as a whole, might be so conclusive of the defendant's guilt that an appellate court would not be justified in interfering with the judgment on this account alone. But in a case where there is substantial

> conflict in the evidence as to the essential points that were required to be submitted to the jury, the course of the judge in unnecessarily assuming to perform the duties incumbent primarily upon others might make it the duty of an appellate court, on this ground alone, to grant a new trial."

We submit, moreover, that the soundness of the proposition that grave error compelling a reversal of this case necessarily resulted from the court's action is apparent upon broad considerations of reason and justice. The solicitude with which the law has always protected even a guilty person from the effect of confessions obtained through fear or hope of reward, evidences the fact that the law abhors the use of force or fear. In *Fitter v. United States,* 258 Fed. 567 (C. C. A. 2d) it is said:

> "The rule in regard to the admission of confessions is stated by the Supreme Court in Bram v. United States, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, as follows:
>
> "But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.
>
> "A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted. * * * "

Sound public policy in our view demands like protection for a witness and would forbid the doing to a defendant through another that which the law would forbid if attempted to be done directly to him.

Indeed the action of the assistant United States attorney trying the case, in declining to ask the witness Kelly any questions in the presence of the jury following this strange interlude leads us to believe that he recognized the utter impropriety of the attempt of the court to force an identification from the Government's witness Kelly [Tr. p. 105] and the remarks of the trial judge when confronted with this attitude on the part of Government's counsel that, "The court will accept that responsibility, gentlemen, with pleasure, as a matter of necessity," and the conduct of the ensuing examination in a manner hostile to the defendant and the witness must have impressed upon the minds of the jurors that in the language of the Adler case, *supra*, "the judge was of the fixed opinion that the defendants were guilty and should be convicted."

In view of this failure of the prosecuting attorney to accept the court's invitation to bring before the jury, the fruit of its grilling it would seem a more likely and a more consistent position for the Government upon this appeal to advance the theory that, admitting that the "tentative" identification of Connley wrung from the witness Kelly, was improper, yet he was nevertheless identified as the man with whom Kelly dealt by the witnesses Albert Kruse and Charles Kruse and that, therefore, misconduct of the trial court in relation to the witness Kelly should not result in reversal.

Anticipating this contention, we respectfully direct the attention of the court to the fact that during the testimony of the said Albert Kruse (who was an employee of Mr. Kelly), and before Kruse had been asked to identify "tentatively" or otherwise, appellant, Connley, the

statements of the assistant United States attorney and of the court as to their dissatisfaction with the testimony of Mr. Kelly, and their intention to recall him and make their dissatisfaction plain, had been made in the presence of this witness. [Tr. pp. 184, 186.]

We respectfully submit that the effect of such statements made over appellant's objection, must of necessity have impressed upon the witness Albert Kruse that the safest thing for him to do was to testify in accordance with the apparent wishes of the court.

In *Rutherford v. United States*, 258 Fed. 855 (C. C. A. 2) the court said:

> "We think that the attitude of the court in regard to the testimony of these three witnesses and the action it took in the presence of the jury in the case of the witness William F. Hudgings was most prejudicial to the defendants. It was very likely to intimidate witnesses subsequently called, to prejudice the jurors against the defendants, and to make them think that the court was satisfied of the defendants' guilt. What a judge may say to the contrary on such an occasion will not necessarily prevent such consequences. It is not enough to justify a conviction that the defendant be guilty. He has a right to be tried in accordance with the rules of law. The defendants in this case did not have the temperate and impartial trial to which they were entitled, and for that reason the judgment is reversed."

That the grilling of the witness Kelly, and his subsequent arrest upon the adjournment of court, had like effect upon the witness, Charles Kruse, another employee of Kelly, and a brother of Albert Kruse, can hardly be doubted in view of the fact that he was sitting in the court room during the second examination of witness

Kelly. [Tr. p. 193.] The effect of the proceedings upon him is apparent from the fact that in his seeming eagerness to please, he swore positively that the defendant Bruno was the man who drove the truck to the Kelly Boiler Works and took Perfecto Valero away with him. [Tr. p. 192.] This identification of Bruno was controverted by the testimony of Bruno [Tr. p. 218], by that of Perfecto Valero [Tr. pp. 178, 179], and by the stipulation entered into between counsel for defendants and the Government:

> "That a man named Bryant, if called to the witness stand on behalf of the defendant Nick Bruno, would testify that during the entire month of December, 1929, he was with the defendant Bruno and that Bruno and he, Bryant, were attending Mr. Bruno's goats in Cottonwood Canyon some ten miles from the Bruno ranch; that Mr. Bruno was there continuously with him, Bryant, during the entire month and did not leave that ranch for any purpose, and did not come to Los Angeles for the purpose of visiting the Kelly Boiler Works or for any other purpose." [Tr. p. 197.]

We believe it indeed significant that Perfecto Valero, the only witness who identified the defendant Connley prior to the time the court indicated his dissatisfaction with the prior testimony of Mr. Kelly, testified that the first time he had seen defendant Connley was when he saw him at the still on the Bruno ranch [Tr. p. 179] and this despite the fact that Charles Kruse testified that this witness Valero was present at the Kelly Boiler Works at the time the man whom he, Kruse, identified as Connley was there and purchased the boiler tubings which Valero took to the ranch. [Tr. pp. 191, 192.]

That the question of whether or not Connley was present at the Kelly Boiler Works and negotiated for the purchase of the boiler thereafter found at the still on the Bruno ranch was of tremendous importance as a fact in the case cannot be gainsaid; that the only persons who testified to his presence at the Kelly Boiler Works did so after having come in contact with the actions and attitude of the trial judge with respect to the witness Kelly, can likewise not be gainsaid; and we respectfully submit that it is apparent that the court's action in intimidating and arresting Kelly likewise intimidated his two employees, and must have so affected their testimony as to result in prejudicial error for which reversal should properly be had.

Moreover, the aggregate effect of the manner and attitude of the court cannot but have had an effect upon the jury most prejudicial to defendants. If we approach the record of this trial from the viewpoint that the witness Kelly was an honest man, honestly trying to testify to that which he remembered, but only to that—an assumption which we have the right to make, in the absence of proof to the contrary, since he was a witness produced by the Government and vouched for by reason of that production—his testimony with reference to the presence of Connley at the Kelly Boiler Works did not amount to an identification of Connley. His testimony was:

> "Q. Tell the jury whether you see in the courtroom a man who resembles this P. Walker with whom you had these transactions. A. I am telling the jury I looked at the people around the jury there.
>
> The Court: Around the courtroom you mean.
>
> The Witness: Around the courtroom yes, and I only see one that I would say resembled this

man that went by the name of Mr. Walker. I wouldn't say that was him for sure, but—

The Court: Which man is it?

The Witness: This man sitting over there with a red necktie (indicating Connley)." [Tr. pp. 106-107.]

If nothing is read into the statement of the witness Kelly other than that which he in fact said, he did not identify Connley as the man with whom he had the transactions, but said simply that he was the only man he saw in the courtroom that resembled him, and was interrupted by the court, and was seemingly prevented from further qualifying even this "tentative" identification. That each of us daily see persons who resemble other persons of our acquaintance and yet whom we know to a certainty are not the persons whom they so resemble, is a commonplace. Yet the attitude of the court was such that the testimony of Kelly did not so reach the jury.

The sending of the jury from the box; the inquisitorial attitude of the court; the impatient and belittling attitude of the court towards what we believe were the proper objecions interposed by counsel, all had the effect of conveying to the minds of the jurors the fact that the court believed—and no jury would, we think, do other than feel that the court must have had ample private reasons for its manifest belief—that Connley was the man who had dealt with Kelly, and that the witness Kelly was deliberately seeking to avoid an identification of him. No man, however innocent, could escape from being identified, in the mind of the jury, as a wrongdoer under such circumstances, for a half identification apparently extracted by the court from an uncertain witness is as damaging to a person

whose identification is sought as a positive identification could be. We would ask that the Government point out in its brief one single fact testified to by Kelly, which was shown by any testimony in the record to be untrue. We ask this because, as we read the record, in so far as the events to which Kelly testified were referred to by the other witnesses produced by the Government, they corroborated and made manifest the truth of his testimony, and we submit that the entire record of Kelly's testimony shows that, considering his age and physical condition, his memory of the transactions concerning which he was interrogated, was as clear as could reasonably be expected.

Reducing it to its simplest terms, the attitude of the trial judge, and his manner of cross-examining Kelly resulted in the distortion of Kelly's failure to identify Connley into what was as damaging as a positive identification would have been.

Without the identification of Kelly and that of the Kruse brothers, which identifications were tainted by the same vice as was Kelly's, the record as to Connley would simply have shown that according to the testimony of Valero, Connley and another man were in the still pit on December 11, 1929, at the time Valero arrived there, Valero testifying:

> "When I got out to where the still was located, there were two men down below. They were the ones who were waiting there to fix the boiler. These two men were two men other than the one who took me out. One of them was quite stout, about five feet six inches tall, and would weight about two hundred pounds. I don't remember the other fellow. *I couldn't see very well.* (Italics ours.) * * * I first saw this man there at the still; he was there." [Tr. p. 179.]

And that Connley was found in the house on the Bruno ranch at the time of the arrest, under the circumstances hereinbefore set out.

What the verdict might have been as to Connley as to all or each count in the indictment, had the evidence as it went to the jury disclosed these facts alone, can only be a matter of speculation.

A comparison of such a record with that which actually went to the jury makes manifest the prejudice which resulted from the action and attitude of the court.

In the case of *People v. Mahoney,* 201 Cal. 618, 258 Pac. 607, a prosecution for manslaughter alleged to have been committed by the negligent construction of a grandstand which fell, killing a woman sitting thereon, the court said:

> "We deem it unnecessary to review the nearly two thousand pages of testimony taken in the court below. It suffices to say that there is evidence from which the jury might well conclude that the grandstand which collapsed was so negligently constructed as to be unable to carry the tremendous load placed upon it. * * *
>
> The remaining two points urged by appellant as reasons for the reversal of the judgment may properly be considered under one head. They consist of twenty-three utterances by the trial judge and numerous instances where he took to himself the task of examining witnesses, which appellant says conveyed to the mind of the jury the impression that the judge was convinced of the guilt of the defendant and that his sympathy was wholly with the prosecution."

After stating a number of such remarks by the trial judge, the court said:

"We have presented sufficient to show a state of affairs which trial judges should not permit and which may be pointed to as an example of what they should not do in the trial of lawsuits. If they will lend themselves to such methods, if they will so intemperately espouse the cause of the prosecution in criminal cases, no man charged with a penal offense is safe, whether he be guilty or innocent. Every defendant under such a charge is entitled to a fair trial on the facts and not a trial on the temper or whimsies of the judge who sits in his case. Whatever the degree of guilt of appellant here, those who know the circumstances surrounding his conviction are likely to feel that the verdict resulted from the conduct of the judge and not from the evidence.

The prosecution attempts to justify the remarks of the trial court upon the ground that, because there was sufficient evidence of the negligent and faulty construction of the grandstand to support the finding of the guilt of the defendant, they were 'harmless,' made in a 'facetious light,' and that the court was 'indulging in a bit of humor.' It also invokes the curative provisions of section 4½ of article VI of the constitution. Such an attitude on the part of a trial court as that here disclosed cannot be passed over so lightly. Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials. For this reason, and too strong emphasis cannot be laid on the admonition, a judge should be careful not to throw the weight of his judicial position into a case, either for or against the defendant. It is unnecessary to cite the cases bearing on this subject. It is a fundamental principle underlying our jurisprudence. When, as in this case, the trial court persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge, and in other ways discredits the cause of the defense, it has transcended so far beyond the pale of

judicial fairness as to render a new trial necessary. Neither can a plea for the application of the section of the constitution save this situation. The fact that a record shows a defendant to be guilty of a crime does not necessarily determine that there has been no miscarriage of justice. In this case the defendant did not have the fair trial guaranteed to him by law and the constitution.

The judgment of conviction is reversed and a new trial ordered."

Section 4½ of article 6 of the California Constitution above referred to, is as follows:

"HARMLESS ERRORS TO BE DISREGARDED.

"Sec. 4½. No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. (Amendment adopted November 3, 1914.)"

4. That the Court Erred in Refusing to Allow Counsel for the Defendants, or Any of Them, to Interrogate the Witness Kelly Out of the Presence of the Jury, After the Court Had Questioned Such Witness Out of the Presence of the Jury.

An examination of the record shows that the court refused to permit counsel for defendants to examine the witness Kelly out of the presence of the jury after the court had examined him out of the presence of the jury. [Tr. p. 103]:

"Mr. Belt: Now, Mr. Kelly, isn't it a fact that the only way that the defendant which you have

pointed out here resembles the man that called at your place of business is from the fact that he is portly, heavy set, in other words? A. Yes.

Mr. Ohannesian: Now, may it please the court, at this period I don't understand that there is any cross-examination necessary, because this is a matter outside of the trial of the case, and has not bearing upon the trial of the case, and it is also understood—

The Court: Yes.

Mr. Ohannesian: (Continuing) —that it is in the absence of the jury, and is not a part of the record.

Mr. Belt: Do I understand—

Mr. Ohannesian: Just a minute.

Mr. Belt: I beg your pardon.

Mr. Ohannesian: At this time I want the record to show that all that has transpired since the absence of the jury is not a part of the record, and as such will not be made a part of the record.

Mr. Belt: To which we object.

The Court: The record will show that this has been done in the absence of the jury.

Mr. Ohannesian: And not a part of the case.

The Court: And not a part of the case, so far as the jury has the case.

Mr. Herron: And the objections of the defendant are that they are foreclosed the opportunity of examining the man along the same line that counsel is examining him. May the record so show?

The Court: You have enough, gentlemen. You have got your record preserved.

Mr. Herron: If the court please—

The Court: You will have your opportunity of examining.

Mr. Herron: We ask, if the court please, that we be given an opportunity to examine out of the presence of the jury, and take an exception with respect to the refusal so to permit us.

(At this point the jury returned to the court-room.)"

While counsel, as they have pointed out in point 3 of this brief, have been unable to find any authority for the mode of examining witnesses out of the presence of the jury employed by the court in the case at bar, we nevertheless feel that every reason of justice would dictate that if the court, who in the instant case was during the examination acting as the prosecutor, should be permitted such examination, attorneys for the defendant should be permitted to at least exercise the right of cross-examination under the same circumstances.

The error of the court in this regard additionally emphasizes the court's manifest unfairness.

5. The Court Erred in Limiting the Cross-Examination of Plaintiff's Witness, Albert Kruse.

Albert Kruse, a witness called on behalf of the Government, testified in part upon direct examination that a heavy, fleshy man about 30 or 35 years of age came to see Mr. Kelly [Tr. p. 183] and talked to Mr. Kelly in the presence of the witness concerning a boiler base. The jury was excused and after the conversation between the court and the Assistant United States Attorney, set forth in appendix "A" and at Tr. pp. 184, 187, the jury returned to the box and the witness stated, that he had seen the man whom he had previously mentioned at the Kelly Boiler Works two or three times but "didn't pay any particular attention" and stated: "From the witness stand it appears to me like this man between the two gentlemen in gray (indicating the defendant Connley)." [Tr. p. 187.]

On cross-examination the following took place:

"By Mr. Belt:

The Witness: I have testified that I overheard several conversations between the gentleman that was directing the erection of the base to Mr. Kelly. He didn't have either a high tenor or deep bass voice, but just ordinarily speaking, I think his voice was something like mine, not quite as hoarse as mine is.

Mr. Belt: Did he have an impediment in his speech?

Mr. Ohannesian: Just a minute. We object to that as not proper cross-examination of this witness, Your Honor.

The Court: Well, it is cross-examination on identification.

Mr. Ohannesian: We didn't go into the question of his voice.

The Court: Wait a minute. I sustain the objection.

Mr. Belt: Exception." [Tr. p. 188.]

That a witness may be cross-examined on every matter concerning which he testified on direct examination is elementary.

In *Resurrection Gold Mining Company v. Fortune Gold Mining Company*, 129 Fed. 668, it was held that the denial or substantial restriction of a full and fair cross-examination of a witness on the subject of his direct examination was reversible error. See also: *State v. Pancoast*, 5 N. D. 516; 67 N. W. 1052; 35 L. R. A. 518.

6. That the Court Erred in Admitting in Evidence the Written Statement of the Witness Amsbaw and in Commenting on the Contents Thereof, and Was Guilty of Misconduct in Its Examination of This Witness.

In appendix C of this brief, we have set out at length for the court's convenience, the testimony of the witness Amsbaw and the proceedings which took place during his testimony. We have likewise set out at the end of said appendix a copy of the exhibit which was ordered admitted in evidence by the court over appellant's objection [Tr. p. 160] and marked by the clerk "Special Exhibit Introduced by Order of the Court."

An examination of Appendix C will disclose that Government's witness Fred C. Amsbaw had at some length testified upon direct examination, when the assistant United States attorney trying the case made the following remark to the court:

> "Mr. Ohannesian: Your Honor, I have a matter that I want to call Your Honor's attention to, but I would rather call Your Honor's attention to it in the absence of the jury.
>
> The Court: Yes. Will you please step outside. (The jury retired from the courtroom.) [Tr. p. 150.]

Whereupon Mr. Ohannesian continued:

> "Your Honor, I have given to counsel a copy of a statement that we claim was signed by the witness. I would like Your Honor to view this statement. This witness was asked, Your Honor—
>
> The Court: Yes. I will take care of it in a minute." [Tr. p. 150.]

A comparison of that statement signed by the witness and of the testimony given by the witness before the jury had been excused and the written statement had been handed to the court, shows that upon direct testimony Amsbaw testified:

> "Bruno told me he was going to do some excavating * * *. The first time when he came out to the ranch, I don't believe he stated what he had been doing. He was going to use a team was all he stated. He said he was going to excavate to level some dirt I think, move it. He said he was going to use the team to move some dirt and level some dirt at his place. That is all I got out of it. On the first occasion, he did not say anything about a pit. * * * I did not see the team working leveling any time day or night. I was on the place when the team was hauling, but I was not when they were working with the dirt. I was at the place there one time when the dirt had been changed around at different times when I was there. It was different because it had been plowed up there, but I didn't see any team working at hauling any dirt or any such. I did not see any team leveling or hauling dirt about. * * * I first saw Herman Quirin when he came and got the team. * * * He stated he was going to use the team for excavating purposes. I believe he stated they were going to have two teams and run different shifts. Herman Quirin came there and took the team away himself. He took the team to Bruno's Ranch. * * * Bruno had one team at one time and then came back and recommended the other man to take the other team so I furnished two teams. This team that Herman took away I think they got for excavating dirt. I did not see that team at work at any time. I know the use they were put to, because they told me. During the time I was on the Bruno ranch all I saw were some trees being dug out and plowing, and where they dug some trees out in this locality. I judged at the time from what he had been talking to me along with other subjects

about putting in some alfalfa there. That is the only thing I know. I saw the hole down there in the low ground just below the Bruno house, but it looked to me as though there had been a lot of trees dug out there. I did not go up to the hole. It did not interest me at all. I saw work was being done in the low ground while I was there. I noticed there was some work being done there, but I didn't know but what it was being leveled for some alfalfa. I did not go down to see what it was. The trees which I have said were torn out were moved back and the stumps were out of the way more. I saw the stumps. They were fair sized trees. They would cover a space to dig a hole I imagine about ten feet in circumference around. * * * The hole out of which the trees came is about where the pit is now." [Tr. pp. 146-150.]

Between this statement made upon direct examination before the jury was excused and the statement contained in his affidavit made to Spencer, an examination will disclose there is but one thing that could even be argued to be a variance, that is, in his oral testimony he used the word "hole" and said they were going to excavate. In the statement, he said Nick Bruno said he had been digging a "pit" on his ranch and wanted to level down the dirt.

Upon this slight and immaterial variance which amounts in fact to nothing more than the interchange of a future and past tense and the use of two words interchangeable in the vocabulary of the ordinary man, the court predicated a long and severe cross-examination out of the presence of the jury, employing much the same tactics as was employed by the court in examining the witness Kelly, the following excerpt being illustrative:

> "The Court: * * * Now, Mr. Amsbaw, the court appreciates that you may be under some reluctance to testify frankly. I have been in this business so often, especially with reference to violations of this particular law, that I can sympathize with a witness who is a neighbor and desires to be careful. At the same time your government is entitled to have a full disclosure from you of all the knowledge you have, and it appears that on the 7th day of February, 1930, in the presence of Mr. Spencer, the investigator, you made a statement in writing regarding this matter. Do you remember that?" [Tr. p. 151.]

and developed as a result of that examination the fact that whereas the word "pit" had been used in the written statement and the word "hole" in the oral testimony, that the written statement had in fact been prepared by investigator Spencer who had then obtained the signature of the witness to it [Tr. pp. 153 and 154], the witness insisting that he believed he had in fact used in relating the facts to Spencer, the word "hole." [Tr. p. 154.]

The jury was recalled, and the witness then severely cross-examined by the court upon the contents of his statement, after which the statement itself was admitted in evidence over the objection of the appellants [Tr. p. 160], the court by his questions indicating that he considered the memory of the witness had been refreshed by this examination. But refreshed as to what? The only possible effect of this entire proceeding was to give the jury the impression that there was something sinister about the fact that the witness had upon one occasion used the word "hole and upon another, the word "pit" and had permitted the agent to obtain his signature to the statement containing the word "pit."

Prior to the cross-examination of this witness by the court, out of the presence of the jury, there was no showing whatsoever, by statement or otherwise, that the prosecuting attorney was surprised by the testimony given by the witness, and no showing as to whether the prosecuting attorney had talked with this witness before placing him on the witness stand.

We contend that this examination was improper upon the same ground and for the same reasons as the like examination of the witness Kelley, and that for it there was even less excuse. We respectfully call the attention of this court to the argument and authorities cited in connection therewith.

To illustrate clearly and how completely the court had abandoned its judicial functions and taken upon itself the functions ordinarily performed by the United States attorney, attention is respectfully directed to the fact that after the conclusion of the cross-examination above referred to the court directed the jury to be brought in. The jury was thereupon returned into the courtroom and the assistant United States attorney then said:

> "Now Mr. Amsbaw—
>
> The Court: The court will ask this question.
>
> Mr. Ohannesian: Pardon me, Your Honor.
>
> The Court: Now, Mr. Amsbaw, in the absence of the jury has your memory been refreshed as to what Mr. Bruno said to you at the time he first came to get the horses in company with Mr. Quirin?" [Tr. p. 156.]

Whereupon Mr. Herron, one of counsel, objected, saying:

> "If the court please, we object to this question and each and every question which shall hereafter be asked of this witness along the general line, for the reasons which I stated to Your Honor in the absence of the jury, and each of those reasons." [Tr. p. 156.

to which guarded objection the court made the following intemperate and prejudicial reply:

> "The Court: Now that objection of yours in the presence of this jury makes it necessary for this court, in order to protect the court, to go something into the reasons why this thing is done. We had hoped to make it unnecessary in the interest of the defense to do that. I will proceed to do it now. You have opened the door." [Tr. p. 156.]

Could anything possibly serve more completely to prejudice the case of appellant Quirin in the mind of the jury than to have it stated to the jury that things had happened out of their presence which required explanation in order that the very court itself might be protected? To indicate to the jury that things had occurred of discredit to the defense for the opportunity to disclose which to the jury, the court was eagerly awaiting the "opening of the door."

Nothing that thereafter happened, could or did remove from the mind of the jury the effect of thus branding the defense, as a thing from which the very court itself needed protection.

The prejudice to appellants is manifest.

7. **That the Court Erred in Denying the Motion of the Appellant Quirin for a Directed Verdict of Not Guilty Made at the Conclusion of the Government's Testimony and Renewed After the Defendants Had Rested.**

Upon the conclusion of the Government's evidence a motion was made on behalf of the appellant Quirin for a directed verdict of not guilty upon the ground of the insufficiency of the evidence. This motion was denied and an exception taken. [Tr. p. 196.] Upon the resting of appellant's case this motion was renewed, again denied and an exception taken. [Tr. p. 31.]

In order to enable the court to determine whether there is in the record sufficient evidence to support the conviction of appellant Herman Quirin on the first count of the indictment, we have, in addition to the statement of facts appearing hereinbefore, set out in Appendix "B" of this brief, a complete statement of the substance of all the testimony in any way relating to Quirin. Summarized, that testimony is as follows:

(1) That Herman Quirin owned and lived in a house on the Perris-Elsinore Highway at a point where that highway was joined by a dirt road leading across his ranch and across the ranch of Bruno to the Bruno dwelling house, and thence proceeding near the still to the back gate of the Bruno Ranch.

(2) That there was located on the Quirin Ranch, close to his house, a mine shaft partially filled with water, from which there was a pipe leading across the Bruno Ranch to a reservoir near the Bruno house, from which reservoir there was a pipe running to a small tank in the still pit;

that this was apparently the only source of water supply for the still.

(3) That between August, 1929 and January 21, 1930, Quirin bought various consignments of lumber from the Dill Lumber Company, containing among other items 2x12's, 2x6's, and 4x4's, and that some lumber of these dimensions was found in the structure of the still.

(4) That on January 21st, 1930, Quirin, in company with Connley, purchased a bill of lumber from the Dill Lumber Company, which lumber was charged to Quirin, and which was called for by a Federal truck that day. Later that day, after the raid had occurred, this lumber was found on the Bruno Ranch, and the next day was picked up by the Dill Lumber Company and returned to their lumber yard.

(5) That in July, 1929, Quirin went to Amsbaw with Bruno and rented a team for use in moving some dirt, which team was taken to the Bruno Ranch and was paid for by Quirin.

(6) That in the summer of 1929, Quirin came to a place where L. L. Matthews was inspecting some government land, about three-quarters of a mile from the Bruno house, and asked Matthews if he (Matthews) had seen an old mule thereabouts; that upon Matthews replying that he had not and asking Quirin what was being done at the Bruno Ranch, there being from that point a pile of dirt visible on the Bruno Ranch, Quirin replied, "They are building a cheese factory down there."

(7) That the truck which was driven away from the Bruno Ranch at the time of the raid was found, a few

moments later, standing near Quirin's house, and that when agent Clements returned with Barber a little while later, the truck was gone.

(8) That when agent Clements and chief of police Barber entered Quirin's house after Clements' statement that he wanted Quirin for a violation of the National Prohibition Act, Quirin said, "What are you going to do? Are you going to take me over and set me on the spot?"

(9) That Barber had seen Quirin and Connley together and Quirin and Bruno together, and had also seen Connley, Bruno and Quirin together near Qiurin's house.

(10) That on one occasion Ed Funk saw Quirin talking to Nick Bruno.

(11) That on the day of the arrest of the defendants, a distillate drum painted the same color and with the same marking on the end as the distillate drums found in the shed on the hill near the Bruno house, was found at the Quirin home.

We will now discuss these items of evidence separately.

(1) There seemed to be some disposition at the trial to argue that the fact that Quirin's house was so close to the juncture of the highway and the dirt road running to Bruno's Ranch showed that Quirin must necessarily have known of the unlawful operations being conducted on Bruno's Ranch.

In addition to the fact that the record is entirely silent as to what hours of the day or night Mr. Quirin was at home or of the hours of the day or night at which materials were hauled to or from the still, the record discloses that there were at least two other roads opening

upon the Perris-Elsinore Highway at points out of the sight and hearing of persons who might have been at the Quirin ranch house, and that these roads gave access to houses belonging to strangers to this action as well as to the Bruno property. The testimony with reference to these roads is collated at the end of Appendix B. From the foregoing, the most that can be deduced is that materials might have been hauled past Quirin's house to and from the still and might have been noticed by Quirin, if he had happened to be at home at the time.

(2) We insist that no inference of guilt can be predicated upon the fact that water from the bottom of the mine shaft on the Quirin property was piped to the water reservoir on the Bruno Ranch. In this connection we call the court's attention to the fact that a pipe led from the bottom of that reservoir underground to the concealed still pit, and there is nothing in the record to show that Quirin knew or had any reason to know either of the existence of that pipe or of the concealed still.

Surely it cannot be argued that in Southern California, where practically all farming is done with the aid of a developed water supply, there is anything suspicious about the utilization of water from every available source. Quirin was not farming, hence had no use for the water from his mine, and it is obvious that to render the mine of any value, it would be necessary that the water in the shaft be removed. The evidence shows that farming operations were being conducted on the Bruno Ranch with the consequent necessity of water for livestock and other farming purposes. Surely the fact that the persons who were conducting the farming, and as it turned out later

the distilling operations, desired to pipe water and pump it from the Quirin mine to the reservoir on the Bruno Ranch, could have no tendency to put Quirin on notice that the water, which is so necessary to any farming operation, was instead to be unlawfully used. The record does not show that more water was pumped from the Quirin mine than it was reasonable to suppose was being used for domestic and farm uses on the Bruno Ranch, nor was there any showing that Quirin had any knowledge as to how much water was in fact pumped, nor in fact that any ever was pumped.

(3) There also seemed to be some disposition on the part of the prosecution to argue at the trial that the various purchases of lumber made by Mr. Quirin from the Dill Lumber Company, commencing with the purchase in August, 1929, and extending over a period of several months, were made in furtherance of the conspiracy charged in the first count, and that the lumber so purchased was used in the construction of the structure of the still. In this respect, the testimony of Mr. Hotchkiss, the manager of the Dill Lumber Company, who sold these various items of lumber to Mr. Quirin, is very illuminating. An examination of his testimony shows [Tr. pp. 169, 170, 171, 172] that most of the material purchased was not heavy timbering such as was used in the still structure, but was the kind of material ordinarily used in the construction of a frame dwelling house. This witness also testified, on direct examination by the Government [Tr. p. 169]:

> "I have with me a list of tags which contain items of building material that we delivered or that was called for by Mr. Quirin, for his house on the high-

way. I have not examined the house on the highway. I have examined the still and its construction so far as the lumber is concerned."

* * * * * * * *

"Our records do not show, and I do not know which of the items were called for by Mr. Quirin or delivered, but the ones which we did deliver were delivered to the house on the highway. None of it was delivered to the Bruno property." [Tr. p 170.]

On cross-examination, this witness testified:

"There were some timbers and lumber in the still, that is, in the framework in the pit in which the still was located, which was lumber other than that which was sold to Mr. Quirin; in other words, there is a great deal of that lumber in there that we didn't sell to him. I would say that 95% of the lumber in the framework of the pit is lumber that we did not sell to Mr. Quirin. The other 5% of the lumber used in the framework of the still might have been part of the lumber that we sold to Mr. Quirin, but I cannot say that it is. Approximately 5% of the lumber that is in the framework could be part of the stuff we sold to Mr. Quirin." [Tr. p. 173.]

The testimony that 5% of the lumber used in the construction of the still resembled in character and hence *could* have been part of the lumber purchased by Quirin, is so purely speculative as in our opinion to fail to create even a suspicion of Quirin's guilt. It must be noted, moreover, that this speculative possibility is negatived by the fact that in that portion of the timbering of the mine shaft visible above the water line, heavy timbers could be seen, the square pieces of which, according to the testimony of agent Spencer, might well have been 4x4s, and in fact were about that size [Tr. p. 56], and

by the fact that an examination of Defendants Exhibit F, a photograph, in the light of the testimony of the witness Barber that the exhaust pipe leading up the shaft from the pump was of 2-inch diameter [Tr. p. 113], shows that the heavy planking constituting the floor of the shaft was, in fact, 2x12s.

It thus becomes obvious that there is in this case an affirmative showing that the lumber purchased by Quirin was employed in the development of Quirin's property, and in the absence of proof in the record that his house was built or his mine timbered with knowledge on his part of the existence of the still, and in order to further its operation, no inference of guilt can be drawn from the fact of such development.

(4) The record shows that on January 21st, 1930, the appellants Quirin and Connley went together to the Dill Lumber Company and purchased a bill of lumber and nails, consisting of four 6x6-14 common rough; sixteen 2x12-10, the same; eight 2x6-16, the same; 15 lbs. of 30 common penny nails and 10 lbs. of 40 common. These goods were charged to Quirin and were called for by a Federal truck that day, which was the day of the arrest of the defendants. The following day the manager of the lumber company drove to the Bruno Ranch, collected the lumber and returned it to the lumber yard. [Tr. pp. 168, 169.] Counsel for the Government argued that this transaction unerringly pointed to Quirin's guilt. But why? Can there be said to be anything in the fact that a person accompanies another and buys lumber, from which lumber a platform for a water tank has begun to be built, to indicate that the person so buying the lumber

knew that when the tank should have been finished and water placed therein, that that water would be used in the operation of a still? There are countless combinations of reasons which would impel such an act, such as perhaps that one man, desiring lumber and not having an account at a lumber company, might ask another to purchase a bill of lumber for him upon the understanding that he should later repay him, or that one person, desiring to build a water tank, might suggest to another that he purchase the lumber and supervise the construction of the platform for the tank, or that one without money in his pocket might, for a few hours employ the credit of another until he might, for example, be able to cash a check, or that one might have been asked by one representing himself to be a contractor, to purchase lumber, being promised thereafter that he would be paid for the lumber and given a job working upon the structure which was to be built.

These are but a few of the numerous situations which may as well have given rise to the transaction set out above, as the theory of the Government that Quirin purchased the lumber and permitted it to be taken to the Bruno Ranch because he was a member of a criminal conspiracy.

The testimony in the record is very meager as to the purpose for which this lumber was to have been used. The only testimony therein is that of agent Clements [Tr. p. 61]:

> "As we started down there, there were two or three gentlemen in the field down below the house at the time, working on something, either a pipe line or on some lumber that was there."

[Tr. p. 62]:

> "As soon as Alles, Walker, Verda and I came back to the house, I asked Walker what his connections were there, and he said he was building a water tank. There was some lumber there which he was working on. He said that he was a contractor."

and that of agent Alles [Tr. p. 77]:

> "We, Connley, Verda, Clements and I, went back to the house and looked in that stone or cement reservoir and examined a little dug out place with some 2x4's there that Mr. Connley was showing us he was working on to build a water tank that was there; and he was down there for that."

There is no evidence whatever in the record to show that this water tank was to be used in connection with the still: It was simply shown that the lumber was found, and the platform for the tank was being built, on the same ranch.

The character of the material was such as would ordinarily be used for any sort of foundation.

(5) The record showing that in June or July, 1929, Quirin went to Amsbaw with Bruno and rented a team for use in moving some dirt, which team was taken to the Bruno Ranch, by Quirin, and paid for by him. The only evidence in the record bearing upon the use to which this team was put, was the testimony of Fred C. Amsbaw that Quirin stated to him:

> "he was going to use the team for excavation purposes."
>
> * * * * * * * *
>
> "I did not see that team at work at any time. I know the use they were put to, because they told me so. During the time I was on the Bruno Ranch

all I saw were some trees being dug out and plowing and where they dug some trees out in this locality. I judged at the time, from what he had been talking to me along on other subjects, about putting in some alfalfa there. That is the only thing I know." [Tr. pp. 148-149.]

If it is the theory of the Government that anyone renting a team to excavate, dig out trees, or prepare for alfalfa on the Bruno Ranch, and taking that team to the ranch, must because of that fact be charged with guilty knowledge of the still found on that ranch six months later, we are at a loss to understand why Amsbaw was not indicted as a conspirator in that he rented the team. Merely to set out this episode is to demonstrate that it is entirely consistent with the innocence of Quirin, indeed we cannot see how it could be contorted into raising even a suspicion of guilt.

(6) A like grasping at straws was found in the Government's contention urged upon the trial that, because Quirin when asked by L. L. Matthews what was going on, on the Bruno Ranch, where a pile of dirt was visible, replied, "They are building a cheese factory down there," the Bruno Ranch being some three-quarters of a mile from where the conversation took place, and it later developed that no cheese factory was built, but that a still was instead there constructed, that an inference of guilty knowledge on the part of Quirin should be drawn. The witness was of the belief that the answer was in all seriousness [Tr. p. 167], as indeed it well may have been, for it should not be lost sight of that the ranch and its surroundings had up to that time been used as a goat farm and that, as evidenced by the testimony of Bruno, he

had at times from 800 to 1200 goats on that ranch alone. [Tr. p. 211.] Many kinds of cheese are of course made from goats milk.

The entire lack of any probative value in this incident becomes apparent upon reflection that the witness may, on the other hand have misunderstood Quirin's mood and his reply may well have been intended facetiously.

(7) We are unable to find anything suspicious in the fact that someone drove a truck away from the Bruno Ranch and left it near Quirin's house, at the juncture of the dirt road and the highway, at a time when Quirin was not at home [Tr. p. 63], nor can we see anything indicative of Quirin's guilt in the circumstance that when questioned by Clements as to what had become of the truck, he informed him that

> "the man that owned the truck took the truck away. I don't know him by name but I know him when I see him." [Tr. p. 63.]

(8) The conversation between Quirin, Clements and Chief of Police Barber, at the time of the arrest of Quirin, is set forth in full on page 28 of Appendix B and in transcript pages 63, 72 and 73. In his direct examination, agent Clements testified that he, accompanied by Barber, walked into Quirin's house. Quirin said, "What do you mean by coming in here?" Clements said, "I have come over after you." Quirin said, "What are you going to do? Take me over and set me on the spot?"

We direct the court's attention to the fact that Clements stated that he informed Quirin that he had come *over* after him. To which Quirin said, "What are going to do? Take me *over* and sit me on the spot?"

His testimony upon cross-examination differed from his statement on direct in that on cross-examination he testified recounting the same conversation:

> "I told Quirin he was under arrest; that I was going to take him over to—. I told him he was under arrest for a violation of the prohibition act." He said, "What are you going to do? Are you going to take me over there and put me on the spot?"

We thus have under oath from Clements, three different versions of what he said to Quirin, to-wit:

1. "I have come over after you."
2. "I told Quirin he was under arrest; that I was going to take him over to—.
3. "I told him he was under arrest for a violation of prohibition act.

And two different versions of Quirin's answer to him:

1. "What are you going to do? Take me over and set me on the spot?"
2. "Are you going to take me over there and put me on the spot?"

To these conflicting versions Clements later in cross-examination added the even more confusing statement that Quirin said:

> "What are you going to do? Are you going to take me over there and put me on the spot. I told him no; that I didn't want him, if he wasn't guilty and, if he was guilty, I wanted him. He said he didn't know nothing about the place over there. *Up to that time as a matter of fact, nothing had been said by either of us as to that place over there except when he was talking about putting him on the spot some place.*" (Italics ours.) [Tr. p. 72.]

We would not burden this Honorable Court, with a detailed and precise discussion of this trivial incident, were it not for the fact that events on the trial lead us to believe that the Government will argue that Mr. Clements' second version of Quirin's answer, coupled with the statement of Clements' italicized hereinabove, show that Quirin knew of the still on the Bruno Ranch.

That this argument can be made only by a selection of a particular version from Mr. Clements' diverse accounts of this conversation is obvious. By what *indicia* are we to conjecture a guess that that particular version is the one which occurred? Any effort to urge such speculation is rendered embarrassing indeed to the Government by the testimony of chief of police Barber of Elsinore who relating the *same* conversation recounted it as follows:

> "Officer Clements and I went to the house and found Mr. Quirin in it shaving. Mr. Clements said that he wanted Mr. Quirin. Clements said to Quirin, 'I want you.' Quirin said, 'Who are you?' Clements said 'We are officers.' And Clements walked in and I followed him. Quirin said, 'wait a minute. Wait a few minutes until I get through shaving.' And Clements said 'All right.' After Mr. Quirin got through shaving Clements said, 'Come on and go with us.' From the house of Quirin we went directly to the Bruna Ranch house." [Tr. p. 108.]

The court will notice that this version of the conversation is barren of any reference to spots "there" or elsewhere.

Conceding for the sake of the argument that such reference was in some form made, we submit it would be natural upon the part of any witness to inquire of arresting officers, (if it was their announced or manifest in-

tention to take him over to the place where the violation of law for which they were arresting him had occurred), whether they desired to take him to that place for the sinister purpose of having him seen at the place where the crime was committed. If counsel correctly understand the colloquialism assertedly employed by Quirin, that is exactly what the statement, "Are you going to take me over and set me on the spot" implies. There is no evidence in the record that Quirin at any time admitted any knowledge of the existence of the still on the Bruno Ranch, or said or did anything from which such knowledge could be inferred.

It has been said, "The guilty flee when no man pursueth, but the righteous are as bold as a lion," and the very fact that Quirin was found by the officers about an hour after the raid in his own house placidly engaged in shaving, is persuasive of the fact that he was innocent of such knowledge. Had he been guilty, he would, no doubt, have followed the tactics of the men in the field and gone over the hills and far away.

(9) The fact that Chief Barber had seen Bruno and Connley together could raise no possible inference that Quirin knew of the existence of the still, and the fact that he likewise testified that he had seen Connelly and Quirin together four or five times, without stating when or under what circumstances he saw them, could establish nothing other than the fact that since they were together, they were probably acquainted. Neither can the fact that he had, at different times, whether before or after the arrest he did not say, while passing along the highway, seen Bruno, Quirin and Connley standing together

near the Quirin house, be significant, or give rise to any inference of guilt on the part of any one of the three. In this connection, it may well be remembered that the jury found that Bruno was not a party to the conspiracy and had no guilty connection therewith.

(10) That on one occasion Ed Funk saw Quirin talking to Nick Bruno, they having as the evidence shows been neighbors, (but the evidence not showing where or when or under what circumstances the conversation took place), may mean something, but we are unable to tell what.

(11) Even more far fetched and fanciful was the contention of the prosecutor that, because a barrel of distillate was found at the Quirin home similar in character and markings to those barrels of distillate found on the Bruno Ranch, a connection of Quirin with the still must be inferred.

Whole towns have been built of discarded Standard Oil cans and the containers of distillate purveyed by any of the great oil companies are common wherever distillate is used.

That the distillate in the drum was intended for use in operating the pump in the Quirin mine seems reasonably certain. An inference may perhaps be drawn from this fact that the persons who were using the Bruno Ranch were pumping water from the mine but, certainly, it could have no tendency to show that Quirin knew that, after the water was pumped to the reservoir near the Bruno house, it was taken from the reservoir to be used in an unlawful enterprise.

There is no evidence in the record to show that Quirin was ever on the Bruno Ranch, either before or after the construction of the still, except immediately after his arrest when he was taken there by the officers.

While it is undoubtedly true that a conspiracy or any other offense may be proved by circumstantial evidence, yet the circumstances must be such as to show beyond all reasonable doubt the guilt of the accused. The legal presumption is that the defendants are not guilty; and unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the Appellate Court to reverse a judgment of conviction.

Vernon v. U. S. (C. C. A.), 146 F. 121, 123, 124;
Wright v. U. S. (C. C. A.), 227, F. 855, 857;
Edwards v. U. S. (C. C. A.), 7 F. (2d) 357, 360;
Siden v. U. S. (C. C. A.), 9 F. (2d) 241, 244;
Ridenour v. U. S. (C. C. A.) 14 F. (2d) 888, 893;
Haning v. U. S., 21 F. (2d) 508, 510;
Sugarman v. U. S., 35 F. (2d) 663 (C. C. A. 9).

Not only do these transactions, analyzed separately as above, afford no substantial evidence of the fact that the appellant Herman Quirin had any connection with the conspiracy charged in the indictment, but considered as a whole they are of no greater effect than to raise a mere suspicion that he might have been so connected.

In considering these facts, if one starts with the assumption that Quirin is guilty, these facts may be argued

to be consistent with that assumption. If, on the other hand, one starts with the assumption that he is innocent, each of these circumstances is equally as consistent with his innocence, nor can it be contended that the sum of several circumstances, each consistent with innocence, can as a whole be consistent only with guilt. It is as true in logic as in mathematics that the sum of eleven ciphers is still a cipher.

8. The United States Attorney Was Guilty of Misconduct in His Argument to the Jury, Which Misconduct Was Prejudicial to the Rights of Appellants.

In his closing argument to the jury, the United States attorney stated:

> "And the defendant was present when they said they were going to move dirt with the team on the place. When Bruno made this statement, the defendant Quirin was present. That is the testimony of Fred C. Amsbaw. You will find that in Volume 3, page 239, lines 16 to 22."

> "If Bruno was going to use this team solely for the purpose of drilling, because he was asked to do that by this so-called Romero, this unknown quantity, this unknown man, why would Herman Quirin pay for the team, if Herman Quirin was not in on this? If Bruno was telling the truth, that he merely took the team in order to drill, why did Herman Quirin pay for the team?" [Tr. p. 226.]

Whereupon counsel objected to this as a misstatement of the evidence, after which the United States attorney again stated:

> "Now, gentlemen, I say to you in July and August Bruno said, or told the witness, rather, Govern-

> ment's witness Amsbaw, in the latter part of July or August, he had been digging a hole. Sometimes he called it a pit and sometimes a hole, and he wanted the team with which to level the dirt. What has that to do with drilling? [Tr. p. 228.]

The testimony was that Bruno had gone with Quirin to Amsbaw in the latter part of July, 1929 and had rented a team, for which Quirin paid, saying that he wanted to level some dirt [Tr. pp. 146, 148 and 149]; that on January 18th, 1930, Bruno rented a grain drill from one Wagoner and on January 20, 1930 Bruno rented from him a team to pull the drill; that Bruno paid for the team and the drill. [Tr. p. 166.]

The harm to the appellant Quirin by the above misquotation of the testimony is apparent. There is no evidence whatever which could have the slightest tendency to indicate that Quirin was in any way connected with the renting by Bruno of the team and grain drill from Wagoner on January 18 and 20, 1930. This transaction was six months after the renting of the team from Amsbaw in July, 1929, and the two transactions were in no way related. The misstatement by the United States attorney tended to connect the appellant, Quirin with the Bruno Ranch immediately prior to the finding of the still, which could not have failed to prejudice Quirin. The prejudice was aggravated by its repetition after the attention of the United States attorney had been directed to it and by the court's statement to counsel concerning the objection and counsel's reiteration of his point as follows:

> "Herron: If the court please, it has nothing to do with it. They were months apart and counsel knows it—six months apart.

Court: It seems to me you are unduly sensitive about this.

Herron: I am, Your Honor; I am might sensitive.

Court: Too sensitive.

Herron: I do not think so, Your Honor. I think when the district attorney has his attention called to a vital error that I am sensitive when I insist—

Ohannesian: I am not in error and I appeal to the jury. I gave the book and pages— (Testimony of Nick Bruno.)

Herron: We assign that as additional error.

Court: Proceed.

Herron: Exception, and we ask the court to withdraw the statement.

Court: You may proceed.

Herron: Exception." [Tr. pp. 228, 229.]

And again, when referring to the testimony of L. L. Matthews [Tr. p. 231] the United States attorney said, inferentially that Quirin had a herd of 800 goats on the Bruno Ranch [Tr. p. 232], and when counsel objected that there was no such testimony, the court criticized counsel in very sarcastic terms for objecting and stated that the United States attorney was not making any misstatements. [Tr. p. 232.]

In his efforts to persuade the jury that the testimony of the defendant, Verda was untrue, the United States attorney, referring to the argument of Mr. Herron, then counsel for the defendant Bruno, said, "And when Mr. Herron, the former district attorney of the United States makes that statement, I am forced to say that it is because he is employed by the defendants and he is obliged to defend them at any cost." [Tr. p. 233.]

Upon it being suggested by the court that the remarks should be withdrawn, the United States attorney offered to withdraw it on condition that counsel for defendant should withdraw their statements that he had misquoted the evidence. When counsel refused to do this, and the United States attorney withdrew his apology, the court aggravated the situation by saying:

> "I think we can save time by disregarding this colloquy between these attorneys, and drop the whole thing out of your mind. It is somewhat unfortunate. I think there has been unusual aggravation of Mr. Ohannesian and he naturally yielded to it, but I hope he will be permitted to continue with his argument and I hope he will not permit himself to be aggravated by these unnecessary and irritating interruptions in making some extravagant remarks hereafter."

The cumulative effect of these misquotations, added to the effect of the attitude of the court throughout the trial, particularly during the testimony of the witnesses Kelley and Amsbaw could not have failed to prejudice the minds of the jury against the appellants. An atmosphere of prejudice permeated the entire proceedings and prevented that fair, dispassionate and impartial trial which is the right of the accused in any criminal case.

In *Latham v. United States,* 226 Fed. 420, the court said:

> "The district attorney, in closing the case for the Government, made the statement that, had the train not been three hours late, he would have had another witness, who would have testified that he also had been defrauded. The defendants' counsel immediately objected, and the objection was sustained by the court, and the jury properly cautioned not to consider said statement of counsel.

The defendants' counsel assign these remarks as error in his twenty-seventh assignment. The almost unbroken line of authorities hold that it is to the action of the court upon the objection to which error may be assigned; that, if the court stops counsel and cautions the jury, this cures the violation of the defendants' right to a trial and verdict on the testimony of witnesses, and not statements of counsel not based on testimony. And in ordinary cases this is the correct rule. Yet in each of the cases expressions will be found which militate against this view in exceptional cases.

Every one must realize that there are exceptional cases where, although the court does stop counsel, and does caution the jury, the impression has been made by the remarks of counsel, and although the jury honestly try to ignore that impression, it still enters into and forms a part of the verdict. In such cases the trial court should set aside the verdict on motion for a new trial. The language of Justice Fowler, in Tucker v. Henniker, 41 N. H. 325, is pertinent, and applies with great force to criminal prosecutions:

'Yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they in the slightest degree influenced the finding, the law is violated, and the purity and impartiality of the trial tarnished and weakened. * * It is unreasonable to believe the jury will utterly disregard them. They may struggle to disregard them. They may think they have done so, and still be led involuntarily to shape their verdict under their influence. That influence will be more or less, according to the character of the counsel, his skill and adroitness in argument, and the force and naturalness with which he is able to connect the facts he states with the evidence and circumstances of the case. To an extent not definable, yet to a dangerous extent, they unavoidably operate as evidence which must more or less influence the minds of the jury, not given under

oath, without cross-examination, and irrespective of all those precautionary rules by which competency and pertinency are tested.'

"The prosecuting officer is usually a person of considerable influence in the community, and the fact that he represents the government of the United States lends weight and importance to his utterances. He does not occupy the position of a defendant's counsel, but appears before the jury clothed in official raiment, discharging an official duty. The realization of these considerations should lead the officer to the exercise of the utmost care and caution in making statements before the jury, and should induce him to confine his arguments and statements to the testimony of the witnesses, in order that no right of the defendant is violated."

Counsel for appellants do not contend nor do they believe that the misquotations of the evidence by the United States attorney were intentional, but the prejudice and harmful effect resulting therefrom were as great as though these misstatements had been made designedly, and the duty resting on counsel for defendants to object to them was not affected by the fact they were unintentionally made. Appellants urge that the court has no right to reprimand counsel for making proper objection to the argumeut of opposing counsel.

People v. Hamilton, 268 Ill. 390, 109 N. E. 329.

9. The Court Misdirected the Jury.

The court directed the jury as follows:

"The court is privileged to say to you, and we do now, under the qualification we have already made, that the proof offered by the government, uncontradicted and unexplained, would justify you in finding each one of these defendants guilty as a co-conspirator. We say it would justify you; we do

not say you should do that, because if we should say that we would be invading your province as the sole judges of the facts of the case. We can only say to you that, as a matter of law, these facts, if you deem them to exist, are sufficient in law to support a conviction, but it is for you to say whether you want to make those deductions yourselves and whether you are compelled by a judgment beyond a reasonable doubt to make them to the extent of convicting any one of these men."

Undoubtedly the qualification referred to in this instruction is the statement found on page 240 of the transcript, as follows:

"We are even empowered, if that function is discretely exercised, to advise the jury how the court weighs the facts and what the court's conclusions are as to any disputed question of fact. In 20 years' experience on this bench I have not attempted to go that far in very many cases, if ever, and it is not the court's purpose to go that far here. I only speak of it because some of you may be more familiar with a different practice and think it is strange that we go as far as we may go in this instruction. But you are the sole judges after all of the facts in the case and not the court. The court may discuss the facts only by way of assisting you to put the facts accepted by you in their proper legal relationship, only to make the law of the case clear to you, not to influence your judgment as to what the ultimate facts are."

This instruction was excepted to [Tr. p. 254, Ex. 45] and was not corrected by the court.

While the above instruction referred only to the first count of the indictment, it is made to apply to the remaining counts by the following portion of the court's charge:

"Now, it follows—sufficiently in this case, at least, because of the uncontradicted nature of the govern-

ment's testimony—that whomever you convict, if two or more, under this conspiracy charge, may be convicted under each one of the other charges." [Tr. p. 251.]

The foregoing instruction is virtually an instruction that, as a matter of law, the appellants were guilty of the offense charged and was a palpable invasion of the province of the jury to pass upon the weight of the evidence.

In this case the Government attempted to convict the defendants by circumstantial evidence. There was no direct testimony as to the actual participation of the defendants or either of the appellants, in acts which, we may say as a matter of law, make them guilty. The Government relied on a proof of a chain of circumstances to establish the participation of these appellants, of the crime charged, and it was for the jury to say whether or not the circumstances shown would warrant them in believing, beyond a reasonable doubt, that these appellants had so participated.

By the foregoing instruction, the court limited the function of the jury to a determination of the truthfulness of the witnesses, and, usurping the function of the jury, directed it as to what inference should be drawn from the facts testified by the witnesses, if the jury believed them to exist.

Such an instruction was held erroneous in *Hickory v. United States,* 160 U. S. 408, 40 L. Ed. 474.

In this case the court instructed the jury:

"But the law recognizes another proposition as true, and it is that 'the wicked flee when no man

pursueth, but the innocent are as bold as a lion.' That is a self-evident proposition that has been recognized so often by mankind that we can take it as an axiom and apply it to this case."

In commenting on this instruction, the court said:

"This instruction was tantamount to saying to the jury that flight created a legal presumption of guilt, so strong and so conclusive that it was the duty of the jury to act on it as an axiomatic truth. On this subject also, it is true, the charge thus given was apparently afterwards qualified by the statement that the jury had a right to take the fact of flight into consideration, but these words did not correct the illegal charge already given. Indeed, taking the instruction that flight created a legal presumption of guilt with the qualifying words subsequently used, they were both equivalent to saying to the jury that they were, in considering the facts, to give them the weight which, as a matter of law, the court declared they were entitled to have, that is, as creating a legal presumption so well settled, as to amount virtually to a conclusive proof of guilt."

See, also:

Starr v. U. S., 153 U. S. 614, 38 L. Ed. 841;
Blair v. U. S., 241 Fed. 217 (C. C. A. 9th).

In *Starr v. U. S., supra,* the court said:

"It is true that in the Federal courts the rule that obtains is similar to that in the English courts, and the presiding judge may, if in his discretion he think proper, sum up the facts to the jury; and if no rule of law is incorrectly stated, and the matters of facts are ultimately submitted to the determination of the jury, it has been held that an expression of opinion upon the facts is not reviewable on error. Rucker v. Wheeler, 127 U. S. 85, 93 (32:102, 105); Lovejoy v. United States, 128 U. S. 171, 173 (32:389, 390). But he should take care to separate

the law from the facts and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province. M'Lanahan v. Universal Ins. Co., 26 U. S. 1 Pet. 170, 182 (7:98, 104). As the jurors are the triers of facts, expressions of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgments. They should be made distinctly to understand that the instruction is not given as to a point of law by which they are to be governed, but as a mere opinion as to the facts to which they should give no more weight than it was entitled to."

The trial court also instructed the jury:

"You are justified in assuming that the pipeline from the Quirin mine to the well or to the still was an essential factor of this unlawful operation. You have seen how obvious that was in its close association to the Quirin residence, and, in the absence of anything to qualify the force and effect of that testimony, you are justified, if you conclude to do so, in assuming that Quirin permitted his premises to be used in this enterprise, at least to that extent and if he did that consciously, knowing that he was making thereby a contribution to this unlawful act, he associated himself with it as fully as if he were there all the time actively at work underground, and this is independent of the other testimony which has been argued to you, coming from the government, of his association with the man Connley—otherwise Walker —and Bruno at various times." [Tr. p. 250.]

To this instruction, the appellants excepted in the following language:

"Mr. Belt: Yes, I have an exception I would like to have noted, Your Honor, in the interest of the defendant Quirin, to the statement that the jury would be warranted in believing that Quirin permitted water knowingly to be taken from his reservoir for use in the still." [Tr. p. 255, Exc. 46.]

After which exception the court further instructed the jury as follows:

> "The Court: The court means by that—and if I didn't make it plain, I will do so now—that in view of all circumstances the construction there at the mine, especially in proximity to Quirin's residence, the character of the pipe and the direction which it took, the ownership of the property by Quirin and the incidents that would normally accompany the pumping of water in that shaft to go through that pipe, these things unexplained would warrant the jury in concluding that Quirin consented consciously, knowingly and willingly to the use of his premises to that extent to aid this unlawful enterprise. When we say that we do not mean that should be your conclusion, because that is your business, not the court's. I am only telling you if you base upon those incidents a conclusion that Quirin was a party to the conspiracy, it would stand in law. That is all." [Tr. p. 255.]

The appellants submit that the instruction given by the court following counsel's exception made manifest and aggravated the error in the original instruction, instead of correcting it. The vice in this instruction is two-fold: first, that it ignores the fact that all of the acts which the evidence show, were done by Quirin, do not of necessity render him guilty of any of the charges in the indictment, unless they were done with guilty knowledge that a still was located on the Bruno Ranch and that his acts or some of them, would contribute to its operation; second, the charge of the court embraces both questions of law and fact and amount to an instruction that, as a matter of law, the jury should follow the court's opinion as to a matter of fact.

That there was no evidence to support the court's view that the evidence disclosed beyond a reasonable doubt, such knowledge on the part of Quirin, has been argued at length under point 7, subdivision 2, at page 59 of this brief.

The second objection to this instruction is based on the same reason and authority as our objection to the first instruction considered herein. (Page 79 of this brief.)

For the foregoing reasons, the appellants respectfully urge that the judgments of conviction should be reversed and a new trial ordered.

Respectfully submitted,

MARK L. HERRON,

~~C. L. BEER~~,

RUSSELL GRAHAM,

Attorneys for Appellants.

APPENDIX A.

The Substance of All Testimony and Proceedings in Re Misconduct of Trial Court on Examination of Government's Witness Kelly.

On March 19, 1930, Richard Kelly, called as a witness for the government, testified:

"I have been sick abed for the last five or six days and just got out of a sick bed to come over here.

The Court: Mr. Kelly has bronchitis and that may account for his condition of voice.

The Witness: I am the proprietor of the boiler works located at 557 Mission Road, this City. I buy and rebuild and sell boilers and tanks. I have been in business about 30 years. Am acquainted with Pete Valero, who has worked for me about a year. He was so working in the month of December, 1929.

Referring to March 7, 1929, I at that time sold to one P. Walker a boiler. The man that bought that boiler came to my place of business in March of 1929. He was a large, heavy man. [Tr. p. 81.] There are twenty or thirty people in every day talking about boilers and—referring to your question as to whether a man by the name of P. Walker came to my place of business either in the month of March or July, 1929, and bought a boiler, all those things are of record in our books. Our books are here. I am selling boilers every day. I remember selling a man a boiler by the name of Walker. But they come in every day. I had the transaction with that man personally. He was a large man, is about all I can remember of him. I should say his age was about 30; somewhere around that. He would weigh about 200 pounds; somewhere around that. I wouldn't say he would probably weigh a little over that. After this date I did not sell this same man, P. Walker, another boiler.

Answering your question as to whether I obtained for this man Walker a Thompson boiler, I will tell

you how that happened. They wanted terms on a part of the payment of the boiler and they wanted me to arrange to get it, that is, those people that got the boiler did. I think it was in January that these men came in and made arrangements to purchase a Thompson boiler. But we have records concerning that transaction.

(Being shown a statement on the letterhead of the Thompson Boiler Works and asked if he had ever seen it before) the witness continued [Tr. p. 82]:

I can't see this but I can tell you about the transaction. I can't read it. I can't see it. Anyway, I can tell you all about it without this. These people wanted to get a boiler, that is, two or three people. The man known to me as P. Walker was one of them. He did most of the talking, I guess. He said he wanted this boiler and he wanted to get time on part of it, and he wanted me to arrange to let him have the boiler and pay what he could on it and have a contract on the balance. But Thompson wasn't willing to let the boiler go that way. So I dropped out of it. And they bought the boiler and paid cash for it and I didn't have a thing to do with it. The boiler wasn't charged to my account. They paid the Thompson Boiler Works cash for it. I did not have a thing to do with it. I didn't get a penny out of it or didn't have anything to do with it.

Q. How come that upon this photostatic copy that his Honor has upon his desk there it appears to be charged to the Kelly Boiler Works?

The Court: It wasn't charged to them. It was billed. It is marked as having been paid in cash.

Mr. Belt: Further objection is made that the witness has failed to identify the exhibit as offered.

The Court: The witness first said he had the records showing the transaction, but now he says the transaction didn't occur at all. Now, which is right?

The Witness: We have no records concerning this transaction at all. I never had possession of the

boiler; didn't own it and didn't sell it. [Tr. p. 83.] I took them over to the Thompson Boiler Works, though that is, I took the bunch over there. As to whether or not cash was paid by Walker and his companions, I wasn't present. I found out it wasn't going my way and I had other business to attend to. So I didn't pay any further attention to it. This all occurred in January of this year, I think shortly after New Years. I think the date is on that contract there. I think this is the date that is on this sheet. That is the time that this transaction took place. I haven't read it at all. If that is the bill, that is the date. When I am well I can see well enough with my glasses on. I use just ordinary glasses. I am nearly 68 years old. I have my glasses here.

Q. By Mr. Ohannesian (Referring to the bill which had been handed to the witness): What is this here?

The Witness: I don't know anything about it. I don't think I have ever seen that paper before. I don't know what transaction that bill refers to. I notice that it is billed to my firm, the Kelly Boiler Works. I take it for granted that that was the date they got the boiler. As I said before, I didn't have a thing to do with the purchase of the boiler. They bought it themselves because I haven't got any records in my books concerning it at all. I don't know anything about that paper. I notice that the paper bills a boiler to the Kelly Boiler Manufacturing Company. My company did not buy a boiler of the Thompson people on that occasion. It was probably billed to me because they started in to buy the boiler on contract and have it charged to me; and Thompson wouldn't let it go that way. So I just dropped the whole thing and didn't have anything more to do with it. [Tr. p. 84.] I don't remember now whether while I was there negotiating with the Thompson people on that occasion anybody undertook to make out a bill to me. This man Walker who went with me on that occasion was about 30

years old and a large man, weighing 200 pounds or over, and was smooth shaven as near as I can remember. I don't believe I saw him with his hat off. All of the other transactions I had with them are all on our books. Any other deal which we had besides this is all on our books. They got some pumps later, I think, and then returned them again. I don't remember whether we sold to one P. Walker on August 30th—three lubricators. All of the transactions are on our books, which are here in court. You can get all of that in the books. I wouldn't carry that in my head. My bookkeeper is here as a witness. She can tell you all about that. I don't pay any attention to the books at all. The book which you have just handed me is my book all right and all entries for the month of August, 1929, to and including November and December, 1929, are in that book and they refer to items sold to P. Walker. If it is in there, it is all right. I think the boiler that these men wanted from me, which they finally got from the Boiler Works, was about a 30-horse-power boiler, made by Thompson. I suppose it carried their name on the boiler. I don't remember the dates when Pete Valero worked for me in the month of December, 1929. In the month of December he went to their place. I didn't know where he was. I instructed him to go. He went to their place. I don't know where it was. They picked him up and brought him back. Some of their drivers picked him up. [Tr. p. 85.] I know they wanted some repairs done; the Walker outfit wanted it. They applied for me to get somebody to do some work for them. I don't remember now who it was that applied. There were four or five of them. There were several of them in there at different times. I don't remember which ones it was ordered this work done. It was before I took these parties over to Thompson's that I had this pump transaction with them. So when Walker came to me after a boiler I had seen him before several times. He did not tell me where the boiler was to go or where the pumps were to go."

Thereupon counsel for all of the defendants announced that they did not desire to cross-examine the witness. The assistant United States Attorney then stated:

> "At this time, may it please the Court, I am somewhat surprised at the testimony given by the witness in some respects; and, in order to call his attention particularly to a transaction had with Mr. Spencer relative to this matter, I want to ask him if he did not have a talk concerning this matter, or rather an interview, with Mr. Spencer, the government investigator, about this boiler. Did you not? [Tr. p. 86.]
>
> Mr. Graham: I object to that.
>
> The Court: He may answer yes or no.
>
> Mr. Graham: I want to state my objection, your Honor. It is objected to on the ground that it is an attempt to impeach his own witness.
>
> The Court: Overruled. Proceed.
>
> Mr. Graham: An exception.
>
> The Witness: Mr. Spencer spoke to me concerning this boiler and its sale and movement and the sale of other articles, such as tubings. And I attempted to tell him truthfully what I knew about it. I recall that Mr. Spencer (whom the witness identified as being a man who stood up in the courtroom) spoke to me concerning the sale of these boilers and other articles to Walker. That conversation took place about two weeks ago in my yard.
>
> Mr. Graham: It is understood that this is all subject to our objection.
>
> The Court: Yes; certainly.
>
> The Witness: I don't think anybody else was present other than my self and Spencer; that is, when he came over there first there was some one who was I suppose an officer with him. The second time there wasn't. It was about two weeks ago when he came there the first time and the second time was four or five days later. At that time he was alone. [Tr. p. 87.]

Q. By Mr. Ohannesian: Did that Mr. Spencer ask you whether or not you had sold a boiler in July, 1929, to Mr. Walker, alias Mr. Connley, and you said yes? A. No—I—

The Court: Wait a minute. Is there any objection to that?

Mr. Graham: That is objected to, first, on the ground it is leading and suggestive and, second, on the ground it is an attempt to cross-examine his own witness and to impeach his own witness and, third, on the ground that no mention has ever been made here about Mr. Connley. The testimony has all been about P. Walker.

The Court: In view of the character of this witness' testimony and his slowness to answer the questions and the answers as given to the questions sometimes, the court will permit the government not to impeach this witness' testimony, which, of course, is objectionable, but to refer this witness to statements that he may have made heretofore about the same transaction for the purpose of now refreshing his memory. The witness comes on the stand and says he is ill and his testimony, speaking discreetly, is very vague. His memory can't be refreshed by the recall to him of statements. Of course it has to be pretty carefully put.

Mr. Graham: An exception.

Q. By Mr. Ohannesian: Following the instructions of the court and not by way of impeachment of the witness, only to assist you in recalling the conversation that you had with Mr. Spencer—

The Court: No, not for that purpose; only to refresh his memory so that he may testify from a refreshed memory at this time. [Tr. p. 88.]

Mr. Ohannesian: Very well.

Q. With that in mind, do you recall the conversation that you had with Mr. Spencer concerning these matters?

Mr. Graham: We object to that on the ground that is not the fact that is material, whether he had the conversation.

The Court: Overruled. We need some preliminary steps always before we can walk. Go on.

Mr. Graham: An exception.

The Witness: Well, I don't remember the conversation I had with Mr. Spencer concerning these matters. He asked me about buying his first boiler. I think; and I told him all of the records are on the books. I don't carry these dates and books in my head. I have a set of books for that purpose. I don't think that at that time there was any conversation relative to the purchase of the Thompson Boiler. If there was I just simply told him I didn't have anything to do with it. I had a conversation concerning a Thompson boiler. I don't remember whether the Thompson boiler was mentioned or not. I thought it was the first boiler they got you were trying to find out about. There was a first boiler. They did buy a boiler from me. I sold tubings to Mr. Walker for the first boiler at a later date. They came and got these tubings themselves, that is, those people that were having the work done came. I don't know who they were. They had three or four drivers that used to come by and pick stuff up. Some of the drivers got it. I don't recall who ordered the tubing for the first boiler but I have a book record for that. [Tr. p. 89.] Everything is in the book. I was present when the tubings were sold for the first boiler. I am the one that sold it. I don't remember what the man looked like to whom I sold it. There were three or four of them in there off and on. I don't know which particular one ordered the tubing. I don't remember the date when I sold a certain number of tubings for the first boiler but I remember I sold them some tubing. It is in the book. I don't know whether I recall or remember the appearance of the man to whom I sold them. There were two or three of them came in there. They didn't give any names at all. All of it was carried in the books under the name of

"P. Walker." As I said before, P. Walker, under whose name I carried these items, was a heavy set man, weighing something like 200 pounds or more. From the very beginning of these transactions they were carried on the books in the name of P. Walker, which was the only name we had. I got that name at the beginning of this business with them and everything they got was charged to P. Walker. We didn't charge anything to him until they ordered the first boiler. That was when the account started. This first boiler was about a 30-horse-power boiler, not a Thompson boiler. That was bought about a year ago. I don't remember the date. It is all on the books there. There were two or three of them in there at the time of the negotiations for that boiler. One of them called himself P. Walker. I didn't hear the names of the others. I don't remember whether the same man who called himself P. Walker came in afterwards and ordered the tubings and fittings and pumps and other things like that. [Tr. p. 90.] I only seen him a couple of times. That is how we got our account started under the name of P. Walker, because he ordered this boiler, and everything else went on the book under that account. They paid cash but we made the entries on the books under the name of Walker. They always paid cash. They didn't always pay cash at the time but they would pay it later. They didn't get any credit to speak of. When they got the boiler they paid for it; and those other little items there wasn't any of them that amounted to very much. They usually came in a few days later and paid it. A man by the name of Walker was one of them who spoke to me concerning the Thompson boiler."

(Counsel for defendants announcing they did not desire to cross-examine, this witness was excused.) [Tr. p. 91.]

On March 21, 1930, Russell F. Thompson, called as a witness, testified substantially as follows:

That he was the assistant manager of the Thompson Boiler Works, manufacturers of steam boilers, hot water

heaters, valves and necessary fittings, and was slightly acquainted with Mr. Kelly; that on January 8, 1930, he saw Kelly at the Thompson plant; that Kelly brought some gentlemen over that wanted a boiler of about 40 horse-power; [Tr. p. 137] that they wanted to buy it from Kelly who did not have the article in stock and thinking that Mr. Thompson would have it, brought them over to the Thompson plant to get what they wanted. We sold them a 40 horse-power Dry Back Scotch Marine Type boiler, it carried the name Thompson on the front of the combustion chamber, on the water column and on the back and the initials "T. B. W." on the smoke stack. [Tr. p. 139.] This was the only 40 horse-power boiler of this type sold by us in January, 1930. [Tr. p. 140.] Government's Exhibit 10 is a picture of the boiler so sold. These men wanted to purchase the boiler on credit but as they could not give me a credit rating, I refused to give them credit and they paid for it in cash. [Tr. p. 145.] The price was $1450. [Tr. p. 144.] Mr. Kelly brought these men over; stayed there a few minutes and then Mr. Kelly left. The other men stayed there until my men had loaded the boiler on their truck and they left with the boiler. [Tr. p. 142.] Our bookkeeper made out the bill (a photostatic copy of which is marked Government's Exhibit No. 18), showing the sale of this boiler to the Kelly Boiler Works. I had him ask the man who bought the boiler to whom I should make out the bill and they told him the Kelly Boiler Works. The Kelly Boiler Works did not participate by way of commission or otherwise in the transaction. [Tr. pp. 142 and 143.]

On March 25, 1930, during the testimony of Albert Kruse, an employee of Richard Kelly, the following proceeding took place:

"The Court: I don't see why this court shouldn't order that man Kelly in here again.

Mr. Ohannesian: Your Honor, in the absence of the jury, I may have something to state on that.

The Court: You may step out a few minutes, gentlemen. We will see about this.

(The jury retired from the courtroom.)

Mr. Ohannesian: Your Honor, yesterday some person came up to my office who was well acquainted with Mr. Kelly and, in fact, he has worked at Mr. Kelly's place—not this gentleman—and he stated that after Mr. Kelly had gone back to his place of business he said, "Well, they didn't get anything out of me; I couldn't read or see, and they wanted to give me some glasses to read with, and I had my glasses in my pocket all the time. They didn't get anything out of me." [Tr. pp. 184, 185.]

The Court: I was very well satisfied that Mr. Kelly was determined the other day not to make a witness in this case if he could help it.

Mr. Ohannesian: I didn't want to bring this matter up and would not have unless it was suggested by the court, because I thought it might in some way interfere with the due progress of this case, and would take it up at a later date. But I am willing to abide by whatever ruling your Honor wants to make. I do think Mr. Kelly ought to be brought before this court.

The Court: Well, when it comes to the question of identification, certainly Kelly ought to be able to help, better than this man. Would you know the man you saw talking with Kelly again, if you saw him?

The Witness: Well, I probably would, although there is lots of people coming in there and the chances are I may and the chances are I may not.

The Court: He had his hat on?

The Witness: I saw the man, as far as that is concerned, with his hat off and on.

Mr. Ohannesian: I think I can clear it up; I don't know. It is very unfortunate the witness is not here. I asked this man how many times this man objected to the way in which the base was being made and whether or not the same individual had been there before, referring to the defendant, and this man said he had been there several times. I think if questioned he will say the same individual was there on several occasions. I had not completed my examination of this witness. [Tr. pp. 185 and 186.]

The Court: Telephone Mr. Kelly and tell him he has to come up without further delay. We will not hold this court up.

Mr. Graham: May I suggest, Your Honor, we want to object to counsel making any statements in front of the wtiness before questioning him.

The Court: Counsel undoubtedly has talked to this witness before.

Mr. Ohannesian: I personally have.

Mr. Graham: Exception. We move that the statement of counsel be stricken, the statement as to what he expected to prove by this witness.

The Court: There is no jury here.

Mr. Ohannesian: Let it go out. I have no objection.

The Court: You may bring the jury back again. Who did Mr. Kelly make this boast to, that he would put it over on the court? You have his name, have you?

Mr. Ohannesian: Yes, I have. I have his name. We will have him here.

Mr. Graham: If the court please, if we are going into this matter of Mr. Kelly, I think it should be done in the absence of this witness.

The Court: Why? [Tr. p. 186.]

Mr. Graham: Because it will give the witness the idea if he does not identify some one he will get himself in wrong with the court.

The Court: Oh, no, no. That is not a valid objection.

Mr. Graham: I want the record to show that we take an exception to the procedure.

The Court: Very well. You may have your exception.

(The jury returned to the courtroom.)

The Witness: I have seen the gentleman whom I have described, and who questioned the manner in which the base was built, there at the Kelly Boiler Works two or three times. I am sure they drove in there with a Ford sedan, and I seen them in the office two or three different times, talking with Mr. Kelly and the bookkeeper, Fred Ranney. This man was standing when he was talking to Mr. Kelly about the base. I have seen him sitting down in the office I guess a couple or three times, maybe more, and I have seen him walk from his car to the office. I never noticed him sitting down inside with his hat on. I saw him there, oh, I don't know—that must have been three or four different times; anyway I seen him two or three times in the office, and I seen him that time when he came down and spoke to Mr. Kelly about the base. I didn't pay any particular attention. From the witness stand it appears to me like this man between the two gentlemen in gray (indicating the defendant Connley)." [Tr. p. 187.]

The Court: Telephone Mr. Kelly and tell him he is to come up without further delay. We will not hold this court up.

The Court: Can anyone inform the court as to whether Mr. Kelly is on his way here in response to any telephone message, and, if he is, how long it will take him to get here.

(Whereupon Mr. Kelly appeared in the courtroom.)

The Court: Bring him in here. Mr. Kelly, come forward please. Take a seat there.

(Whereupon on March 25, 1930, the following proceedings took place in the absence of the jury:

"By the Court: Mr. Kelly, when you were on the stand the other day the court told you that you were temporarily excused, but that it might transpire that he would call you back, do you remember that? A. Yes.

Q. You do remember that. Since you have been here, since you have testified, testimony has come to this court very clearly and in a good deal of detail, that you had business transactions with the man known to you as Walker, a good many times; that on one occasion, [Tr. p. 92] with reference to a boiler which has been identified as a dismantled boiler on the Bruno premises, which had been bought from you some time prior to last January, you had ordered one of your workmen to rearrange and reset that boiler on its base because of the direction of this customer, whose complaint was that the base of the boiler and the riveting of it to the base had not been sufficiently protected by cement to keep the heat from disturbing the riveting. I am free to say to you and do say it with some emphasis that we were not satisfied with your conduct on the witness stand the other day. It was quite obvious, not only to the court, but to those who witnessed you testify, that you were minded not to be frank. The episode of your glasses, particularly was convincing that you were attempting to withhold from this jury and from this court information which you obviously had. At least, you were attempting to thwart the production of the truth. Now, developments this morning convince the court that you know a good deal more about this matter than you have hitherto testified to; that you are, to say the least, able to identify the man Walker, known to you as Walker, a man whom your records show

had been a customer of yours covering a period of time, as the man who came back and had your workman Kruse change the setting of the boiler. And we expect you to get your memory in shape to identify that man if he is in the courtroom. Do you understand what the court means and says? A. Yes, sir.

Q. How about it?

Mr. Belt: Your Honor please, at this time— [Tr. p. 93.]

The Court: You can take your exceptions after I get through with Mr. Kelly. I don't care to have Mr. Kelly diverted from what the court is saying.

Mr. Belt: I would like to have the record show my objection.

The Court: You can make your objection when the time is opportune. These interruptions are disconcerting.

Mr. Belt: I think now is the opportune time for the objection.

The Court: Now, Mr. Kelly—

Mr. Belt: An exception.

Q. The Court: Don't you think you could identify the man with whom you had that transaction? A. I don't know. I haven't got very much of a memory for faces—

Q. Do you mean to tell this court that you can't identify a man with whom you had a dozen business transactions regarding two boilers within the last 7 or 8 months?

Mr. Belt: I object to the form of the question on the ground it is attempting to intimidate this witness. This witness has heretofore appeared before this Honorable Court and has testified to the very best of his knowledge and authority, and the remarks of Your Honor at this time can have absolutely no other effect.

The Court: This court doesn't need your help or your advice, Mr. Belt.

Mr. Belt: I know, Your Honor, but I am representing two defendants here, and they are entitled to some protection. [Tr. p. 94.]

The Court: You have your objection in the record. We will proceed with this witness.

Mr. Belt: An exception.

Q. By the Court: Do you mean to call this court—

Mr. Belt: I would like to have the record show also, if Your Honor please, that the court in addressing this witness struck the bench with his fist.

The Court: You may have that. You may get a movie-tone in here and put it in a movie, if you want to.

Mr. Belt: An exception.

Q. By the Court: Do you mean to tell the court you can't identify this man, P. Walker, who had frequent business transactions with you regarding two boilers within the last seven or eight months? A. I only met this man supposed to be Walker two or three times.

Q. You met him two or three times? You sold him the boiler first, didn't you, an upright boiler? A. Yes.

The Court: An upright boiler? A. Yes.

Q. And you had it set on this base in your plant, didn't you? A. No, sir.

Q. Beg pardon? A. No, they came and got it and set it themselves. [Tr. p. 95.]

Q. The base was fastened to the lower part of the boiler in your plant wasn't it?

Mr. Belt: If Your Honor please, I object to that as assuming a fact not in evidence.

The Court: Let him answer.

Q. Wasn't it?

Mr. Belt: Exception.

A. Why, they took the boiler out there, and afterwards they came back and they got another base for it, as I remember it.

By the Court: You remember that? A. Yes.

Q. And you remember that there was some complaint in your office that the riveting of the base was not sufficiently protected by concrete, don't you? A. I think they had to change the position of the ring that held the base in place.

Q. That was done in your plant, wasn't it? A. Yes.

Q. And the boiler and base were there then, weren't they? A. No, just the base.

Q. Just the base, the ring on the base was changed? A. Yes.

Q. At the suggestion of this customer? A. Yes.

Q. And Mr. Kruse did it, is that right? A. No, Mr. Kruse—there was twelve men working over there, and I don't remember who did the work.

Q. You remember it was done under your direction? [Tr. p. 96.] A. Yes.

Q. You had a talk with P. Walker respecting that, didn't you? A. Yes, sir.

Q. And that was when? A. Well, I don't remember the dates; I can't remember the dates at all.

Q. Well, you remember that it was the first boiler, the upright boiler, don't you? A. Yes, sir.

Q. And then some time afterwards he came back to buy another boiler and you took him to the Thompson people, didn't you? A. Yes, sir.

Q. Personally? A. Yes, sir.

Q. You accompanied him to the Thompson people? A. Yes, sir.

Q. And then he bought tubing of you in various quantities, didn't he, and other fixtures? A. Just one lot—

Q. He was there how many times? A. He wasn't there all of those times. He was there about two or three times altogether.

Q. And he dealt with you? A. Yes, sir.

Q. Now, are you able to identify him if you see him? A. No.

Q. What is that? A. No, sir; I couldn't tell for sure.

Q. I don't care whether you can tell for sure. Are you able to make a tentative identification? [Tr. p. 97.] A. I could tell whether he looked like him or not. He was a large man.

Q. Have you got your glasses with you? A. Yes.

Q. Will you need your glasses for identification purposes? A. No, I only use them for reading.

Q. Just for reading. Then you step down within the bar here, and walk around among the people and see if you can identify that man known to you as Walker, who had those transactions with you.

Mr. Belt: At this time I want to renew my objection to the whole of the proceedings on the ground stated in my first objection.

The Court: Very well. You have your record. Proceed.

Mr. Belt: And I further object to the attempted identification on the same ground.

The Court: Proceed, Mr. Kelly.

Mr. Belt: Exception.

Mr. Herron: Exception.

The Court: You can begin at the blackboard and swing all around inside of the bar; don't go outside of the bar; make a circle and pass the ladies, clear around to the jury box. You can go closer, if you desire.

Mr. Belt: Now, if Your Honor please, I don't want to appear argumentative or anything of that

character, but in directing this witness to make the inspection, Your Honor directed him to make an investigation of the persons inside the rail. [Tr. p. 98.] You did not ask him to go outside.

The Court: Let's see. There are 23 persons inside of the railing besides counsel. That is enough.

Mr. Graham: If the court please, I would like to call the court's attention to the fact that some of the people involved in the case here are outside of the railing.

The Court: Well, we will try the people inside of the railing first.

Mr. Graham: Exception.

Q. By the Court: Do you see anybody inside of the railing that, in your judgment, appears like the man who had these several business transactions with you? A. Well, I wouldn't say that I could identify any of them, Your Honor.

Q. You see nobody that resembles that man?

Mr. Belt: If Your Honor please, I again object to the form of the question. It can have positively no other effect upon this witness than an attempt to intimidate him.

The Court: Well, you are getting in your objections.

Mr. Belt: Exception.

The Court: Proceed, Mr. Kelly.

Mr. Belt: It appears to counsel, if Your Honor please, that there should be some limit to this. [Tr. p. 99.]

The Court: The court is of the opinion that this witness is bound not to be frank. He has convinced the court of that.

Mr. Belt: I object to that, if Your Honor please.

The Court: And he is bound to come through, if it is possible.

Mr. Belt: He has answered honestly, to the very best of his ability.

The Court: He does not need your help, Mr. Belt.

Mr. Belt: I know, but my clients need my help, if Your Honor please.

The Court: Mr. Belt is a portly man. Does he resemble him? A. What is that, Your Honor?

The Court: Does Mr. Belt resemble the man who had the business transactions with you?

Q. By Mr. Belt: In your opinion, Mr. Kelly, how much do I weigh?

The Court: Mr. Kelly is now answering the court's question.

Mr. Belt: Pardon me.

A. No, I never seen this man before that I remember of.

Q. By the Court: What is that? A. I say I never seen this man before that I know of.

The Court: Now, Mr. Kelly, walk over here where the bailiff sits and you go around the circle, clear to the jury box and examine the 15 or 20 or 25 individuals that sit up along against the bar, and see if you can find the man that you had business with, or a man who looks like that man. [Tr. p. 100.]

Mr. Herron: It may be understood, I take it, if the court please, for the purpose of the record, that we are understood to have made the same objections to each and every question.

The Court: Yes, but each time you object you interrupt and disturb the thread.

Mr. Herron: Well, we won't object any more, if the record may show this, that we object to each and every one of these questions.

The Court: In whose behalf are you objecting?

Mr. Herron: On behalf of all of the defendants, if Your Honor please.

The Court: Excuse me. We will not hear your objection, except on behalf of the clients that you represent. Mr. Belt is perfectly capable of taking care of his objections.

Mr. Herron: If Your Honor please, at the opening of the trial—

The Court: It makes no difference. Mr. Belt is now taking care of his clients.

Mr. Belt: If Your Honor please, in view of the fact that I have interposed several objections which were overruled, I take an exception. I ask that each question that Your Honor has asked will be deemed to be objected to and an exception taken.

The Court: That will be satisfactory. Nobody else need to get on his feet and object.

Mr. Herron: With due deference to the court, I wish to say that I join in that objection, and exception.

The Court: Mr. Kelly, kindly follow the court's directions. Move around in a circle on the other side [Tr. p. 101] of the table and look at each individual and see if you can see the man with whom you had this transaction, or a man that looks like him. A. Well, I couldn't say that there was anybody that I can—

Wait until you sit down before you talk. I can't hear you.

A. I wouldn't say that there was anybody there that I could say for sure.

I am not asking you whether you can see anyone there that you can say for sure. Do you see anyone there that resembles him, in your judgment, that you saw when you were down there? A. Well, the nearest one down there that I can say that I think looks like him—

Q. Which one? A. That one (indicating).

Q. Well, that doesn't mean anything. Which one? Where is he sitting? A. He is sitting next to that lady there.

Mr. Graham: I couldn't hear that. Will you read that answer please?

The Court: He said he was sitting next to the lady.

Q. Next to the lady with the scarf? A. Yes.

Q. That looks like the man that you had the dealings with? A. He looks more like him than anybody else that I see here.

Q. What is your judgment; is it your best impression that was or was not the man? [Tr. p. 102.] A. Well, I couldn't say for sure.

Q. I am not asking you whether you can say for sure. That is your impression about it? A. Well, all I can say—

Mr. Belt: Now, if Your Honor please—

The Court: Now, this witness is about to answer, and you are interrupting.

Mr. Belt: All right. If Your Honor please, if you will bear with me for just a second. Your Honor asked him a specific question, and he gave you an answer that possibly could not be construed in any other light. He said there was only one man in the room that resembled the man that came to the Kelly plant, and he pointed out the defendant Connley. Now, any other questions along that line, in the opinion of counsel, would be surplusage, and would not affect anything at all.

Q. By the Court: Mr. Kelly, what is your impression; was this man or was he not the man with whom you had the transaction,—not for sure, but your impression now? A. Well, I would say he looks more like him than anybody else I see down there.

Q. Well, does he look like him? A. Well, in a general way, yes.

Q. In a general way he resembles the man that you had these several transactions with, is that right? Is that your answer? A. Yes, sir.

The Court: Very well. Bring in the jury.

Mr. Belt: Now, Mr. Kelly, isn't it a fact that the only way that the defendant which you have pointed out here resembles the man that called at your place of business is from the fact that he is portly, heavy set, in other words? [Tr. p. 103.] A. Yes.

Mr. Ohannesian: Now, may it please the court, at this period I don't understand that there is any cross-examination necessary, because this is a matter outside of the trial of the case, and has not bearing upon the trial of the case, and it is also understood—

The Court: Yes.

Mr. Ohannesian (continuing): —that it is in the absence of the jury, and is not a part of the record.

Mr. Belt: Do I understand—

Mr. Ohannesian: Just a minute.

Mr. Belt: I beg your pardon.

Mr. Ohannesian: At this time I want the record to show that all that has transpired since the absence of the jury is not a part of the record, and as such will not be made a part of the record.

Mr. Belt: To which we object.

The Court: The record will show that this has been done in the absence of the jury.

Mr. Ohannesian: And not a part of the case.

The Court: And not a part of the case, so far as the jury has the case.

Mr. Herron: And the objections of the defendants are that they are foreclosed the opportunity of examining the man along the same line that counsel is examining him. May the record so show?

The Court: You have enough, gentlemen. You have got your record preserved.

Mr. Herron: If the court please— [Tr. p. 104.]

The Court: You will have your opportunity of examining.

Mr. Herron: We ask, if the court please, that we be given an opportunity to examine out of the pres-

ence of the jury, and take an exception with respect to the refusal so to permit us.

(At this point the jury returned to the courtroom.)

The Court: You may sit down.

Mr. Herron: Exception.

The Court: Do you want to question Mr. Kelly?

Mr. Ohannesian: No, Your Honor, we have no questions to ask this witness.

Mr. Herron: We have none.

The Court: The court will accept that responsibility, gentlemen, with pleasure, as a matter of necessity.

Q. By the Court: Now, Mr. Kelly, you testified the other day that you had several business transactions respecting the sale of a boiler to a man by the name of P. Walker, do you recall that?

Mr. Belt: Now, if Your Honor please, at this time I would like to object to any questions being asked this witness that Your Honor has asked of him out of the presence of the jury.

The Court: The court has not yet undertaken to do so. When the court undertakes to do that, why, then you may make your objection.

Q. Do you remember that?

Mr. Belt: On the same grounds, if Your Honor please, as the objections taken outside of the presence of the jury. [Tr. p. 105.]

The Court: Mr. Kelly—

Mr. Belt: Exception.

The Court (continuing): In order to keep your thoughts straight after this interruption, the court will have to repeat the question. This is the question:

Q. Do you recall testifying the other day that you had several business transactions with a man by the name of, or who gave you the name of P. Walker,

who bought a boiler of you and some other material, shown by your books, and whom you sent over to the Thompson Works for a boiler? Do you remember that? A. Yes.

Q. Tell the jury whether you see in the courtroom a man who resembles this P. Walker with whom you had these transactions.

Mr. Belt: I object to that question on the same grounds stated in my previous objection.

The Court: Very well.

Mr. Belt: Exception.

The Court: Your objection is noted. Answer it. A. I am looking at the people—

The Court: Louder, please.

A. I am telling the jury I looked at the people around the jury there.

The Court: Around the courtroom, you mean.

The Witness: Around the courtroom, yes, and I only see one that I would say resembled this man that went by the name of Mr. Walker. I wouldn't say that was him for sure, but—

The Court: Which man is it? [Tr. p. 106.]

The Witness: This man sitting over there with the red necktie.

Mr. Belt: We stipulate he is pointing to the defendant Connley—I will withdraw that.

The Court: You mean the man sitting next to the lady with the scarf on?

The Witness: Yes, sir.

The Court: Let the record show the defendant indicates the defendant Connley alias Walker. Cross-examine.

Mr. Belt: No cross-examination.

Mr. Graham: No questions.

The Court: That is all, Mr. Kelly.

Mr. Ohannesian: We would ask that Mr. Kelly remain for a few minutes.

The Court: You will remain for a few minutes, Mr. Kelly.

The Witness: Here or outside?

The Court: Oh, you may sit in the courtroom.

Mr. Ohannesian: We ask at this time we have an intermission until the usual hour and I will try to get another witness here.

The Court: Do you want to talk to Mr. Kelly about this other matter?

Mr. Ohannesian: No.

(At this point, the court, out of the hearing of the jury, directed the marshal to detain Mr. Kelly in his custody.) [Tr. p. 107.]

APPENDIX "B."

The Substance of All Testimony and Proceedings in Any Way Concerning Appellant Herman Quirin.

According to the testimony of O. G. Spencer, Herman Quirin lived in a small house on the Perris-Elsinore highway. A dirt road leads off of the highway practically straight north of this house, running within thirty feet of it. It is not a graded road, just level ground that has been driven over. It passes in front of his house and straight south across his property through a gate in the fence around Bruno's property, where it runs straight on past the Bruno house and goes between where the still was found and the shed in which were found the distillate drums. [Tr. p. 45.] The still was located in a pit 40x 50 feet, 200 feet southeast of the corner of the Bruno house. On Quirin's land about 100 feet from his house was the shaft of an old mine [Tr. p. 46], in which at the time of the arrest of the various defendants, on a platform about 60 feet from the entrance, a gasoline engine driven power pump was mounted. The exhaust ran up the shaft to the top, ending in a Ford muffler. Connected directly to the pump was a 2-inch iron pipe. The pipe came out of the dump or mine shaft and ran underground to a small reservoir near the Bruno house. A 2-inch pipe ran from the bottom of that reservoir directly to a small tank in the still pit. Apparently there was no other source of water for the still. [Tr. p. 47.] There were 4 or 5 places between the mine and the concrete reservoir where the pipe cropped out of the ground [Tr. p. 53]. In a shed on the hill near the Bruno house, there were 60 distillate drums. There was one similar drum painted the same

color with the same marking on the end, at the Quirin home near the road when Spencer arrived there [Tr. p. 54.] Spencer made an investigation of the lumber that was used in the Quirin house, of that used in the mine pit, and of that used in the still pit. In the still pit were 4 x 4's, 2 x 4's, and 2 x 12's. There were two or three 8 x 8's and several 6 x 6's. [Tr. p. 55.] The witness found none of like dimension in the house known as the Quirin house. He did find in the mine pit some 2 x 2's and some 2 x 4's. He found no 4 x 4's in the mine pit [Tr. p. 55]. However, in the mine pit were some square timbers about the size of 4 x 4's, which might have been 4 x 4's [Tr. p. 56].

William P. Clements, a Federal prohibition agent, testified that, in company with Agent Alles, he went to the Bruno ranch at about 1 P. M. on anuary 21st, 1930. He found there the defendants Bruno, Verda, and Connley, and saw two or three other men working in a field. A search of the place disclosed the still and the three above-named defendants were placed under arrest. [Tr. pp. 58, 59, 60, 61.] One of the men in the field was seen to climb on a truck and drive away in the direction of the Quirin house [Tr. p. 62]. After the three defendants had been placed under arrest, Clements left Verda and Connley in the custody of Alles and followed the truck to Quirin's house. When Clements arrived there, the truck was stopped in the rear of the house. After ascertaining that there was no one in or around the house, Clements took the rotor from the distributor of the truck, drove to Elsinore, telephoned the Prohibition Department at Los Angeles, and returned to the Quirin house in company with Chief of Police Barber of Elsinore, where they found that

the truck was gone and found appellant Quirin alone in the house shaving. [Tr. p. 63.] Clements testified that he walked in. Quirin said, "What do you mean by coming in here?" Clements said, "I have come over after you." Quirin said, "What are you going to do? Take me over and set me on the spot?" So Clements told Quirin that he wasn't setting anybody on the spot; that if Quirin was guilty, he (Clements) wanted him, and if he wasn't guilty, he didn't want him. Clements then asked Quirin what became of the truck. Quirin said, "Well, the man that owned the truck took the truck away." Clements asked, "Do you know the man that owned the truck?" Quirin said, "I saw him a few times." Clements said, "Well, who was he?" Quirin said, "Well, I don't know him by name but I know him when I see him." [Tr. p. 63.] When Quirin finished shaving, Clements and Barber placed him under arrest and took him over to the still. [Tr. p. 64.]

Bruno's ranch cannot be seen from Quirin's house [Tr. p. 66]. There is at least one road into the Bruno ranch, other than the road past Quirin's house [Tr. p. 66].

Clements further testified:

> "When I drove up to the house on the Bruno ranch I first saw the truck that I have testified about. It was a Federal truck. I got the license number. Had occasion to look at the registration and found it registered in the name O. B. Ziegler, 151 North Avenue 20, Los Angeles. C-9518 is the 1929 license number. The next time I saw that truck it was standing behind the defendant Quirin's house. That was around 30 minutes later. But time traveled fast and I wouldn't be sure; there was so much doing all at once. I took the rotary off the distributor and have it here. I did that for the purpose of stopping the ignition. I went

to Quirin's house first. There was nobody there. The house showed signs of being inhabited. I didn't search it. I just walked through it to see if there was anybody in there. And there was nobody in there, and I turned around and walked out and went to Elsinore. Subsequently I returned to the Quirin house and the truck was gone. At that time I found Herman Quirin, the defendant here, at the premises. I walked in the house; did not rap; did not ring a bell. The door was open and I walked in. I saw the defendant Quirin standing in front of the mirror shaving. He spoke first, saying, "What do you want?" I told him I wanted him. At that time I told him I was an officer of the law; told him I was a federal officer. I had my buzzer or badge on. The badge is marked, disclosing the fact that I was a prohibition agent. I had my badge on my vest under my coat. I told Quirin he was under arrest; that I was going to take him over to—I told him he was under arrest for a violation of the prohibition act. He said, "What are you going to do? Are you going to take me over there and put me on the spot?" I told him no; that I didn't want him if he wasn't guilty and, if he was guilty, I wanted him. He said he didn't know nothing about the place over there. Up to that time, as a matter of fact, nothing had been said by either of us as to that place over there except when he was talking about putting him on the spot some place. He eventually accompanied me; and I took him over to the Bruno Ranch. And eventually all of the defendants were gathered together there and subsequently incarcerated at Elsinore. [Tr. pp. 71, 72, 73.]

A. G. Barber, Chief of Police of Elsinore, a witness on behalf of the Government, testified that he met Prohibition Agent Clements about 2 p. m. on January 21st, 1930, and accompanied him to the Bruno Ranch. Prior to arriving at the Bruno Ranch, they arrived at the house of Herman Quirin, where they found Mr. Quirin shaving. Mr. Clements said that he wanted Mr. Quirin. Clements

said to Quirin, "I want you." Quirin said, "Who are you?" Clements said, "We are officers." Clements and the witness walked in. Quirin requested that they wait until he finished shaving, and Clements agreed, after which the officers took Quirin directly to the Bruno Ranch-house. In the Quirin house, there were two or three beds. A table was set, and the breakfast dishes had not been cleared off the table. The house was about 30 feet from the Elsinore highway [Tr. pp. 108, 109]. This witness saw a 2-inch pipe line coming out of a mine shaft near the Quirin house, running in the direction of the still. From the pipe line it ran to a small reservoir near the Bruno house, and from the reservoir was a pipe line running to the still. He searched, but found no other source of water supply for the still. [Tr. p. 113.] He testified that on January 21st, the day of the arrest of the defendants, there was no break in the pipe line. In the mine was a gasoline engine about 60 feet down the shaft [Tr. p. 114]. This witness testified that he had seen Herman Quirin before; had seen him several times in and around Elsinore. At times he had seen Quirin with Connley, and at other times with Bruno. He had seen him approximately 4 or 5 times with Connley and more than once with Bruno. He saw the three of them close together out there by the Quirin property while he was going along the highway, at different times. [Tr. p. 114.] On cross-examination, this witness testified that on the day of the raid he followed the pipe line from the mine down to the inside of the Bruno property, through the reservoir to the pit by the still, and on that occasion the pipe was continuously connected so far as was visible above ground. [Tr. pp. 116 and 117.]

During the testimony of Mr. Barber, the court, the jury, the parties and all counsel went to the Quirin Ranch and to the Bruno Ranch, and inspected the Quirin house, the mine shaft on the Quirin land, the pipe line coming out of the mine shaft, the Bruno ranch, the reservoir, house, shed, and the pit containing the still, as well as all the surroundings. The various articles and places were pointed out to the jury by the witnesses who had testified and by counsel for both sides.

Fred C. Amsbaw testified that in the summer of 1929, defendant Nick Bruno came to see him in company with the appellant Herman Quirin; that Bruno and Quirin stated that they wanted to rent a team from him; that they had dug a hole and wished to level some dirt. Bruno introduced Quirin to Amsbaw and stated that he would stand good for the team. Quirin paid the rental on the team and left with it. He took the team to Bruno's Ranch. This witness was later on Bruno's Ranch and saw the team there, but did not see the team working. During the time the witness was on the Bruno Ranch, he saw there were some trees being dug out and some plowing being done where the trees had been. There was a hole in the low ground just below the Bruno house, where the still was later found. A boy returned the team to Amsbaw. [Tr. pp. 146, 147, 148 and 149.]

Ed Funk, a witness called by the Government, testified that on one occasion he saw the defendant Herman Quirin talking to Nick Bruno. [Tr. p. 164.]

L. L. Matthews, a witness called by the Government, testified that during the latter part of July or the early part of August, he saw the defendant Herman Quirin

at his house near Elsinore. He had a conversation with Quirin, the witness' brother being the only other person present. He asked Quirin about certain section lines and the corners; that he walked to a piece of Government land about three-quarters of a mile west of Bruno's house. Quirin came up to the witness there and inquired about a mule. The witness saw a large pile of dirt down by Bruno's house, about three-quarters of a mile away, and asked Quirin what they were doing there. Quirin answered that they were building a cheese factory down there. This statement of Quirin's seemed to the witness to be intended seriously. The witness saw a team there by the pile of dirt, but could not say for sure that he saw anyone working there. [Tr. p. 167.]

N. S. Hotchkiss, a witness called by the Government, testified that he was the manager of the Dill Lumber Company at Elsinore; that he knew the defendants Herman Quirin, Nick Bruno, and Peter Connley; that he had had business transactions with Quirin and Connley. In August, 1929, he sold certain lumber to Herman Quirin. Quirin made a number of purchases of lumber between August, 1929, and January 21st, 1930, on which date Connley and Quirin came together and purchased a quantity of lumber which was billed to H. F. Quirin, and which was not delivered but was called for by a Federal truck. [Tr. pp. 168, 169.] This particular lot was never paid for, the witness stating that on the day following its purchase, he went to the Bruno Ranch and loaded the lumber on his truck and returned it to the Dill Lumber Company. Quirin paid for all of the other consignments of lumber purchased by him. [Tr. p. 169.]

Some of the consignments of lumber purchased by Quirin were delivered at Quirin's house, and some were called for by Quirin. None of it was delivered to the Bruno property. [Tr. p. 170.] The witness identified 22 sales tags, showing sales of lumber and building material to Herman Quirin, which were introduced as Government's Exhibit No. 20. [Tr. pp. 170-172.] The witness testified that he examined the lumber in the frame work of the still and found that there were several items listed on the tags that were similar in kind and dimension to some of the timber that was used in the still, such as 2 x 12's, 2 x 6's, and 4 x 4's [Tr. p. 172]. On cross-examination, this witness testified that 95% of the lumber in the frame work of the pit was lumber that his company did not sell Mr. Quirin. The other 5% of the lumber used in the frame work of the pit was similar in size and dimension to some of the lumber sold to Mr. Quirin and might have been that lumber, but the witness stated that he could not say that it was [Tr. p. 173]. He further testified that he had sold approximately 20 pieces of 4 x 4's to Quirin, but did not recall the number of feet. In an examination of the still framework, he did find lumber there that corresponded to that size and number. He did not examine the Quirin house to see whether these 4 x 4's went into that house. He did not find any other timber in that still or in the framework of the still which he recalled as being timber that he might have sold to the defendants or timber of like character. He further testified that he was not familiar with the Quirin Ranch nor with the house thereon; that he had been on that property but not while Quirin was living there. He did not look in the mine on that property. The cleats shown

in the picture of the entrance of the mine were 2 x 4's. The roofing on the Quirin house would correspond to the amount of roofing shown on the bills. [Tr. pp. 173 and 174].

Defendant Nick Bruno, testifying in his own behalf, stated that in August, 1929, he leased his ranch to a man named Frank Romero who stated that he was going to plant the ranch to alfalfa, and that he was going to dig a well and put in a pumping plant at the place where the still was later discovered; and Bruno, further testifying, stated:

> "As I have said, in June I got a team of horses from a man by the name of Amsbaw to carry my hay in from the field to bale it. At a later time I rented another team from Amsbaw. After Frank Romero bought my team and the tools he says, 'Well, this team can't do all the work. We want you to find another team. We don't know nobody here.' He told me this mule too poor, can't do all the work. 'I want you to find a team. I give you a man and you go with him, and you know somebody around here who got a team, and we rent.' And he give me a man and I went to the city. We used to know this fellow here. I know him the first time, and he went down, this man need a team to deliver some dirt, and this man all right, I says, if you let him have it. And he let us have the team. He drive the team home, and I went home to the same ranch where the still later was. When I mentioned Ramirez I meant the man whom I also called Romero. It is the same man. "Ramirez" is a Spanish name, and "Romero" is Italian. I saw Ramirez there after I got the team. I got the man down there. He took the team and put them in the corral. That was in the afternoon about five or six o'clock when the team reached the ranch." [Tr. p. 213.]

On cross-examination Bruno testified that he had bought his ranch about three years ago. He further testified:

> "When I bought the ranch there was no house near the highway, the Elsinore-Perris road. That house was put up about a year and a half ago. A fellow named Herman lived there. I don't know exactly his name. He is in the courtroom. He is that gentleman there, the bald headed fellow (indicating the defendant Herman Quirin). He built the house about a year and a half ago. That house was there complete in the month of July, 1929. I am referring to the house marked "B" on the Elsinore-Perris road. It is not a new house, built within the last four or five months, but there was about a couple of rooms built on there. He added new rooms to it when he came down there. Then after that he built another one, like a screen porch, on the same house; he connected with the same house. I guess that was last summer some time. I don't remember exactly. I know where that old mine pit is. I know that old mine a long time ago. I got the goats down there. I bought that ranch two years ago, but I have the goats down there before two years. I got the goat ranch about five or six years. I do not know when the mine pit was boarded in. When I know the mine there was nothing in the mine. The last time I saw the mine was when the jury come all down there, last Thursday. The last time I saw the mine before I went out there with the jury was before I come here in the court. I was there. I see that six years ago, five years ago, four years ago, three years ago, two years ago, I used to see that mine. I did not see who put the planks in there. I do not know when the planks were put in there. I never saw the work done in there. I do not know when the planks were put in there. I never saw that." [Tr. pp. 219, 220.]

Defendants' Exhibit "A", a panoramic photograph, discloses the location of the roads in relation to the Quirin house. [Tr. p. 66.]

The attention of the court is respectfully directed to Defendants' Exhibit B [Tr. p. 67], also showing the entire extent of the road from the back gate of the Bruno ranch to the highway.

The testimony concerning the roads from the Perris-Elsinore highway giving access to the Bruno ranch and the location of the Quirin property with reference thereto is collated below. Wm. P. Clements, testified:

> "The road that runs past Quirin's house into the Bruno ranch is not a straight road. There is a little curve around the hill; and then it goes right straight in. I don't believe you can see Quirin's house from the Bruno ranch. I saw some different roads running in off the highway in the direction of the Bruno ranch other than the one past Quirin's house; and I have gone over some of those other roads. I don't think there are several roads to get into the Bruno ranch other than the road past Quirin's house, but there is one other that I know of. If there are others around there, I didn't see any. Referring to the one I know of, it hit the main highway I would say possibly half a mile toward Elsinore around a little hill there." [Tr. p. 66.]

During the view of the premises by the court, the following occurred:

Counsel for appellants standing at a pit a short distance from the mine shaft on the Quirin property, stated:

> "Mr. Herron: I think the jury should notice at this point that from the house on the hill which has

been referred to in the testimony as the Bruno house, the Quirin house down by the road is not visible, or vice versa.

The Court: Yes; that is plain." [Tr. p. 121.]

And again, while court and jury were standing on the Bruno ranch at the rear of the Bruno house:

"Mr. Herron: We just want you to observe that this road runs to the back gate, around the back line of the plowed area to the point where it meets with a road that runs along the fence on the east side. Then it follows around back of those hills, coming into the Elsinore-Perris road at a point just practically, by the speedometer, a mile from the Quirin house, measuring a mile from the Quirin house toward Elsinore.

Mr. Graham: Another thing we wish to call your attention to is the road which comes down to the back gate runs to those houses which you observe up on the hill." [Tr. p. 134.]

"Mr. Herron: Let's make a stipulation to this effect: The United States attorney and the attorneys for the defendants stipulate that the road which comes in the front gate of the ranch property runs by the house and out the back gate, and opens into a road which follows the back line of the Bruno property, where it joins a road which comes up the side line of the property and goes around past the front gate. Also, that from the point where the road leaves the back gate of the ranch and travels down and joins the road coming up the side of the ranch the road extends straight ahead and angles back over around the hills, coming into the highway running from Elsinore to Perris, which was the

paved highway we came up, at a point about one mile closer to Elsinore than the Quirin house is located." [Tr. p. 135.]

"Mr. Ohannesian: That is a correct statement.

Mr. Herron: In other words, there is a road leading into the back of the ranch from the highway as well as the front." [Tr. p. 135.]

Mr. Graham: We also want to call attention to the fact that there are two roads leading to the front gate of the Bruno ranch. [Tr. p. 136.]

Mr. Graham: It is apparent that there are two roads leading to the front gate of the Bruno Ranch, one which comes past the Quirin house and the other coming off of the Elsinore to Perris highway at a point one mile nearer Elsinore than Quirin's house. [Tr. p. 136.]

APPENDIX "C."

The Testimony of the Witness Amsbaw and the Proceedings in Relation Thereto.

Fred C. Amsbaw, a witness on behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. Ohannesian:

The Witness: I live at Wildemar about six miles from Elsinore. I know where the Nick Bruno ranch is located. I knew Nick Bruno in the latter part of July, 1929, when he rented my team. He came to see me, and brought another party with him, and wanted to get my team. He said he would stand good for the team. This other man that came with him was a Mr. McPherrin, I believe. He, Mr. McPherrin, rode one horse and led the other and taken them up to his place. Mr. Bruno went back to his ranch. They were taking the stock up to his, Mr. Bruno's ranch. He, Mr. Bruno, told me he was going to do some excavating. I thereafter had occasion to go out on the Bruno ranch. I remember the first time I was out on that ranch. That was about the middle of July or something such. I have been there three or four times. I bought a couple of goats from him. The first time I went out there to the Bruno ranch I saw Mr. Bruno and his wife. One time when I saw him he was milking goats. The first time I went there after he rented my horses it was at the house when I approached the house coming in; but I didn't see him doing anything. I went there a second time and Bruno was around the house. The second time I saw him he was in the house which was part lumber and part adobe, that is, the house on the hill by the trees. I saw him there a third time. He was not doing anything. I once saw him hauling some hay there. [Tr. p. 146.] I saw him using that team. The first time I was there and saw him using the team he was hauling hay on the ranch. I guess he got his hay various

places where he could get it and feed his goats. The first time when he came out to the ranch I don't believe he stated what he had been doing. He was going to use a team, was all he stated. He said he was going to excavate, to level some dirt, I think, move it. He said he was going to use the team to move some dirt and level some dirt at his place. That is all I got out of it. On the first occasion he did not say anything about a pit. I can't say that at any time I saw the team at work. I was by there and saw the team in the corral in the daytime but he had two teams there and seemed to be working them at different times. I did not see the team working leveling any time day or night. I was on the place when the team was hauling but I was not when they were working with the dirt.

Q. By Mr. Ohannesian: Were you ever on the place when you saw Mr. Bruno leveling the dirt?

Mr. Herron: We object to that as having been asked and answered.

The Court: No; he has not been asked that particular question.

Mr. Herron: Exception.

A. No; I wasn't. I was at the place there one time when the dirt had been changed around at different times when I was there, it was different, because it had been plowed up there; but I didn't see any team working at hauling any dirt or any such. I did not see any team leveling or hauling dirt about. [Tr. p. 147.] I did not see anyone leveling dirt there with a team or without a team day or night. I had more than one conversation with Bruno. The second time I had a conversation with Bruno was with regard to a goat, about me getting a goat. I had no other conversation; just those two occasions. That is all I talked to Mr. Bruno. The horses were brought back to my place from Wednesday to Wednesday. That was a week, seven days, they were kept. A boy brought the team back. I would judge he was about 18 or 19 years old.

I have seen the defendant Herman Quirin. He is in the courtroom. I first saw him when he came and got the team. That was about the first part of June. I had a conversation with him. I talked with him. He stated that he was going to use the team for excavating purposes. I believe he stated they were going to have two teams and run different shifts. That is all he said. I talked with him and I told him the team had been on pasture and they weren't in good condition to do a great lot of real lugging work, that is, in the way of moving dirt. He said they would work them in the afternoon when it was cooler. He said they were going to move some dirt with the team on the place. My wife and I were there when that was said. Mr. Quirin was present talking to me. There was a boy with him. When I saw the team it was on Bruno's place. After the team was taken back Herman Quirin came there and took the team away himself. He took the team to Bruno's ranch. I saw the team there once when they took them away. I didn't investigate around at all or ask any questions. Herman Quirin paid for the team. Bruno had one team at one time and then came back and recommended the other man to take the other team. [Tr. p. 148.] So I furnished two teams. This team that Herman took away I think they got for excavating dirt. I did not see that team at work at any time. I know the use they were put to because they told me so. During the time I was on the Bruno ranch all I saw were some trees being dug out and plowing and where they dug some trees out in this locality. I judged at the time, from what he had been talking to me along on other subjects, about putting in some alfalfa there. That is the only thing I know. I saw a hole down there in the low ground just below the Bruno house, but it looked to me as though there had been a lot of trees dug out there. I did not go up to the hole. It did not interest me at all. I saw work being done in the low ground while I was there. I noticed there was some work done there but I didn't know but what it was being leveled

for some alfalfa. I did not go down to see what it was. The trees which I have said were torn out were moved and the stumps were back out of the way more. I saw the stumps. They were fair sized trees. They would cover a space to dig a hole, I imagine, about ten feet in circumference, around. I saw the trunks of the trees. They were willow trees. I noticed the trunks were drug back more on a hill. With reference to the Bruno house, the house is on a knoll and the trees were drug out over on another knoll. The hole out of which the trees came is about where the pit is now. I have been over there and know where the pit is now. With relation to where it now is the trees were growing on identically the same spot. I saw the space on which there now appears to be a stack of hay before the hay was there. There was a little house setting right there where that hay is now when I first saw the place. [Tr. p. 149.] I saw that the house had disappeared from where it was then. At the time I was there he was building the little tin house where the gas tanks is now. I cannot say that I noticed any buildings going up or work going on where those trees were uprooted that I have just described. I never saw that work going in. After the trees were taken out there was some excavating work done there undoubtedly, which I noticed. I noticed there had been more dirt dug up and moved. I noticed there was a kid there working doing the leveling and an old gentleman there, too.

Directing my attention to Mr. Verda, the old gentleman in the courtroom, I never saw that man there. I never saw any of the defendants that are here out there leveling the ground. None of the defendants told me they had done any of the leveling out there.

Mr. Ohannesian: Your Honor, I have a matter that I want to call Your Honor's attention to, but I would rather call Your Honor's attention to it in the absence of the jury.

The Court: Yes. Will you please step outside?

(The jury retired from the courtroom.)

Mr. Ohannesian: Your Honor, I have given to counsel a copy of a statement that we claim was signed by the witness. I would like Your Honor to view this statement. This witness was asked, Your Honor—

The Court: Yes. I will take care of it in a minute.

Mr. Ohannesian: Very well.

Mr. Herron: We think the witness should be excused during the time—

The Court (Interrupting): No. The witness will stay here. Now, Mr. Amsbaw, the court appreciates that you may be under some reluctance to testify frankly. I have been in this business so often, especially with reference to violations of this particular law, that I can sympathize with a witness who is a neighbor and desires to be careful. At the same time your government is entitled to have a full disclosure from you of all the knowledge you have, and it appears that on the 7th day of February, 1930, in the presence of Mr. Spencer, the investigator, you made a statement in writing regarding this matter. Do you remember that? A. Yes, sir.

Q. By the Court: And you signed it? A. Yes.

The Court: Now, I will show you what purports to be that, and ask you if that is the statement that you made?

Mr. Herron: If Your Honor please, I feel that for the purpose of the record we must object to this proceeding and this examination.

The Court: Very well. You may enter your objection and an exception. Proceed.

Mr. Graham: An exception.

A. Yes, sir.

The Court: Is that statement true? A. Yes, sir.

The Court: And it is true, then, that at the time that Bruno came to you in the latter part of July, 1929, he said he had been digging a pit on his ranch

and wanted to level down the dirt? He said that, did he? A. Yes.

The Court: You asked him to go along, that you might drive your team, and he refused and said he had a man to drive it? A. Yes.

The Court: And that Quirin came with him? A. Yes.

Q. By the Court: And drove the team, yes? That is right, is it? A. Yes, sir.

The Court: And this statement that you made refreshes your memory as to what happened in that transaction, does it? A. Yes.

The Court: Do you want anything more with this witness before the jury comes back?

Mr. Ohannesian: No, Your Honor, I think not.

Mr. Herron: I would like to ask him a question. Are you certain that those were the exact words, that he had been digging a pit on his ranch?

The Court: No, he doesn't have to be certain about the exact words.

Mr. Graham: Your Honor, it is very important whether Bruno told him he was digging a pit, or simply was leveling some dirt.

The Court: Did he tell you he had been digging a pit? A. He stated he was going to level some dirt where there was a hole.

The Court: You say in this statement that he told you he was digging a pit. Is that true or not? A. Wouldn't you call a large sized hole somewhat of a pit?

The Court: Yes. But did he say that he was digging a pit? A. He didn't say he was digging—he said a hole.

The Court: Now, you say here that he said he had been digging a pit on his ranch and wanted to level down dirt. Did he say that or not? A. The pit proposition is what gets me.

The Court: Well, you can remember whether or not he said that he was digging a pit, can't you? A. The hole proposition would be similar to a pit, the way I look at it.

The Court: Did he say he had been digging a hole? A. Yes.

The Court: He said he had been digging a hole? A. Yes.

The Court: Do you think he used the word "hole" rather than "pit"? A. Yes.

The Court: And that he had been digging it? A. Yes.

The Court: Anything more?

Mr. Herron: Did he say he had been or was going to? A. He had been, and wanted to level the dirt down.

Q. By Mr. Herron: And wanted to level the dirt down? A. Yes, sir.

Q. Did you write this report or dictate it, or did Mr. Spencer, the agent, write it up from what you said, and then ask you to sign it? [Tr. p. 153.] A. He wrote it up and asked me to sign it.

Q. And the language in that report is his language, isn't it?

Mr. Ohannesian: We object to that.

The Court: He may answer that.

Q. By Mr. Herron: The language in the report is his language, isn't it? A. Yes, it is his language, and yet it might not be just as I worded it, and yet it would make it come out in the right language.

Q. It is the same effect, but the exact language is the language of Spencer, isn't it? A. Yes.

The Court: But the only criticism you make of it is that he used the word "pit" where you said "hole"? A. Yes.

Q. By Mr. Ohannesian: It was after Mr. Spencer had spoken to you and asked you what the facts

were that he wrote this up, is that right? A. Yes, that there has been typewritten over.

The Court: Did you read it over before you signed it? A. Well, I read the paper that was written over.

The Court: This paper that you signed here? A. Yes.

The Court: And the only modification you would make of that statement would be to substitute the word "hole" for "pit"? A. Yes.

The Court: You used the word "hole"? A. Yes.

The Court: Bring the jury in. [Tr. p. 154.]

Mr. Herron: If Your Honor please, before the jury returns, we wish to enter our objection to this entire proceeding on the ground, first, that there has been no reluctance shown on the part of the witness to testify to the truth; second, that it is examining him upon a statement admittedly employing the words of a government agent, rather than his own words, and I know, without any intention on the part of the court, nevertheless we feel that we must object upon the ground that the questioning by the court out of the presence of the jury upon this statement can have no other effect than to intimidate the witness and to cause him to feel that he must now in effect make his statement conform to the language used in this statement, which was prepared by Spencer, and read over and signed by him.

The Court: Well, Mr. Amsbaw, all this court wants of you is to tell all of the truth about this, not to keep anything back.

The Witness: Well, I will tell you—

The Court: Just a minute now. Wait until I get through. We want you to tell the truth. The court is not trying to intimidate you, and vou don't understand that, certainly. He has said here several times in this court that this man actually did say he had been digging a hole. If that is true, we want you to tell this jury. If it isn't true, we don't want

it at all. The court is taking no sides in this case at all, but we are insistent that we shall get all of the truth.

Mr. Herron: We object and ascribe that statement as error, upon the ground that it can have no effect [Tr. p. 155] unwitting though the court may be about it, than to intensify in the mind of the witness the thought that the court might feel that he is not telling the truth, and put him under compulsion to tell another or different story than he was testifying to under oath.

The Court: Well, is it the truth that you used the word "hole"?

The Witness: Yes.

The Court: Bring in the jury.

(The jury returned into the courtroom.)

Mr. Ohannesian: Now, Mr. Amsbaw—

The Court: The court will ask this question.

Mr. Ohannesian: Pardon me, Your Honor.

The Court: Now, Mr. Amsbaw, in the absence of the jury has your memory been refreshed as to what Mr. Bruno said to you at the time he first came to get the horses in company with Mr. Quirin?

Mr. Herron: If the court please, we object to this question and each and every question which shall hereafter be asked of this witness along the general line, for the reasons which I stated to Your Honor in the absence of the jury, and each of those reasons.

The Court: Now, that objection of yours in the presence of this jury makes it necessary for this court, in order to protect the court, to go something into the reasons why this thing is done. We had hoped to make it unnecessary in the interest of the defense to do that. I will proceed to do it now. You have opened the door.

Mr. Graham: May I state we object to the court making the statement as to the reasons? [Tr. p. 156.]

The Court: You are not going to make any statement to the jury. We are going to interrogate this man and get the reason.

Mr. Graham: Exception.

Q. By the Court: Now, Mr. Amsbaw, in February of this year you made a statement about these matters to one of the government agents, Mr. Spencer, didn't you? A. Yes.

Q. And that was reduced to writing?

Mr. Herron: In addition to the objection I made, I desire to object on the ground it is an attempt to impeach the testimony of the government's own witness.

The Court: No, it isn't. It is an attempt to get all of the testimony of the government's witness.

Mr. Herron: An exception, if Your Honor please.

The Court: It is not an attempt to impeach him at all.

Q. That was Mr. Spencer, wasn't it? A. Yes.

Q. And after you told him all you knew he reduced it to writing, didn't he? A. Yes.

Q. And you signed it after reading it over; that is true, isn't it? A. Yes.

Q. And, having seen that document, your memory is refreshed as to what happened? A. Yes. [Tr. p. 157.]

Q. That is what you told the court in the absence of the jury, isn't it? A. Yes.

Q. Now, tell this jury substantially what Mr. Quirin said to you was the reason he wanted these horses—or that Mr. Bruno said to you when he and Mr. Quirin came in July last to get your team and rent it of you? A. My understanding was—

Q. What did he say in substance, now? What did he say that he wanted the horses for? A. He wanted the horses to level the dirt down from a hole. That is what he spoke to me about.

Q. What did he say, if anything, about having theretofore dug a hole? A. He had dug a hole and he wanted to level the dirt down. At that time I offered to work for him, drive my own team, and he rejected it. He said he had a man.

Mr. Ohannesian: Your Honor, at this time, if the court deems it necessary, I now submit the written statement that Your Honor has referred to, and, in view of the fact that it was used in order to refresh his recollection as to what was said by the defendant Bruno to him, it is offered in evidence in support of the testimony given by the witness.

Mr. Graham: We object to it on the ground that it is an attempt to impeach the witness.

Mr. Ohannesian: It is not for that, and I so stated.

The Court: If this is your only objection, it is overruled. [Tr. p. 158.]

Mr. Herron: And we object on the further ground it is hearsay, incompetent, irrelevant and immaterial, being an *ex parte* statement not made from the witness stand, and admittedly, as stated by this witness, not containing his words but the words of the agent.

Mr. Ohannesian: There is no such evidence as that at all.

The Court: That should not have been said in the presence of this jury.

Mr. Ohannesian: Counsel knows that and he ought to be cited for contempt for making such a statement, Your Honor.

Mr. Herron: It is part of my objection.

The Court: But you should not have said that in the presence of this jury.

Mr. Ohannesian: That is a matter I avoided by asking the jury to leave.

Mr. Herron: Then I will ask the court to instruct the jury to disregard it, or I will ask the witness the question in the presence of the jury.

Mr. Ohannesian: The statement is not a subject of cross-examination. It was not used for that purpose and counsel knows it. From his long experience he knows that his conduct is not correct.

Mr. Herron: I believe my conduct is correct.

The Court: We will have no controversy on that subject at all, but we will not submit this statement to the jury because the jury has from this witness the substance of it.

Mr. Herron: Then we will ask that the comments of the court as to what the statement contained, contained [Tr. p. 159] in the court's questions to the witness on the statement, be stricken.

The Court: I beg your pardon. What do you want stricken?

Mr. Herron: The remarks of the court purporting to read from the statement.

Mr. Graham: The statement of Your Honor which is, in effect, a statement of what the witness' statement contains, when Your Honor said that since the jury had returned he had testified substantially—

The Court: You don't mean to question the court's truthfulness about it?

Mr. Graham: Not at all, Your Honor.

Mr. Herron: Merely the correctness in point of law of the court's action; certainly not the court's truthfulness.

The Court: This is made a part of the record. Exceptions by each defendant.

Mr. Herron: Thank you, Your Honor.

The Court: The jury will determine whether the court misread that.

Mr. Herron: We don't want to be misunderstood as questioning the court's truthfulness.

The Court: That is what it amounted to.

Mr. Herron: We object to it on legal grounds.

The Court: Never mind; it is in. We will not talk about it any more.

Mr. Herron: If the court please, I feel counsel is entitled to have this court and jury understand that at no time did we reflect upon the truthfulness or the fairness [Tr. p. 160] of interpretation of this or any other district judge. I have practiced too long in these courts not to know the high character of federal judges and their honesty and sincerity, to have any such imputation put upon anything I might ever do. I do feel, however, in justice to the defendants I represent, that if the court has committed error, I should preserve that fact in the record in the event the case should be taken up on appeal.

Mr. Graham: We mean legal error and not an error in the statement of the court.

The Court: There is no question about. You are all right on that. We are not questioning that, but this statement is now in.

Q. What difference is there between the statement as given to Mr. Spencer and reduced to writing by him, to which your attention was drawn, and what you have said to the jury as to the purpose for which Mr. Bruno said he wanted the team?

Mr. Herron: We object to that on the ground it is not the best evidence. The statement is in and the testimony of the witness is in the record, and that is the best evidence.

The Court: All right. You admit the statement?

Mr. Herron: No, we don't admit it. It is in the record over our objection.

The Court: Then you are waiving your objection.

Mr. Herron: I do not desire to be so understood. I protest against any such interpretation of my statement. I merely called the court's attention to the fact that the statement being evidence and this witness having testified [Tr. p. 161] that a comparison of this statement which Your Honor admitted in evidence and gave us an exception to its admission,

and the record of the testimony of the witness, is not the best evidence. My objection goes to that.

The Court: You are extremely difficult to please. I hope I please you now. The court said to this jury, to which you took exception, that there was no substantial difference between the statement and the witness' testimony, and for that reason we would not permit the statement to go in. Then when we undertook to discover whether there was any substantial difference between the statement and the testimony of the witness, you objected because you say the statement is in. You can't have that thing both ways, so we will leave it just as it is. Go on to something else.

Mr. Herron: An exception.

(Counsel for all of the defendants announced they did not desire to cross-examine this witness.)

(Whereupon the court made the following statement):

The Court: Now, gentlemen, about this statement, before we go any further. If you discover anything of substance in the statement to which the witness has not testified, why, to that extent, of course, you ought not to have this statement put in against you. You may examine it and see.

Mr. Ohannesian: I may state, for the purposes of the record, that I gave to the counsel an original duplicate copy of the statement before the witness was examined, and they had it before them when the examination took place. [Tr. p. 162.]

Mr. Herron: That is, you mean before the witness was interviewed, following the first portion of your examination.

Mr. Ohannesian: Following the first portion, and you have had it with you ever since.

Mr. Herron: Yes.

The Court: If there is anything in that statement to which the witness has not testified substantially to this jury, the court will strike that part

out, if you ask the court to. You have the opportunity. Swear this witness."

The following is the written statement referred to:

State of California, County of Los Angeles—ss.

I, Fred C. Ansbaw, General Delivery, Elsinore, California, deposes and says:

That, Nick Bruno rented a team of horses from me the latter part of July, 1929, said he had been digging a pit on his ranch and wanted to level down the dirt. I asked to go along to drive my team, but Nick refused, said me had a man to drive it. Paid me $2.00 a day to use this team and kept it about one week. When Nick came to my place to make arrangements for this team, a fellow by the name of Herman Quirin came with him. Nick made arrangements for the team and Quirin drove it away. The team was returned to me in about one week by a boy, whom I do not know. Nick also used this team to haul bale and loose cut hay in June, 1929, to the ranch where the still was located. I know he took the hay to his ranch because I saw it stacked there on the ranch afterwards.

I saw Nick Bruno on the ranch where the still was located several times after July, 1929. The last time I saw him was when I was passing along the highway which leads from Perris to Elsinore, when Nick drove up from his ranch to the highway in a Ford truck loaded with hay, this was in November, 1929. The reason I remember the date, I was working in Perris at the time and was on my way home to Elsinore.

FRED C. ANSBAW
Fred C. Ansbaw

Subscribed and sworn to before me this 7 day of February, 1930.

O. G. SPENCER, *Investigator.*

Which exhibit was endorsed by the clerk as follows: 9926 M Crim. Special Exhibit. On examination of witness Ansbaw marked in evidence by direction of court, March 21, 1930.

R. S. ZIMMERMAN, *Clerk,*
By LOUIS J. SOMERS, *Deputy.*

APPENDIX "D".

Errors Assigned. [Tr. pp. 270 to 275.]

Comes now Peter Conley and Herman F. Quirin, the defendants above named, and file the following statement and amended assignment of errors, upon which they and each of them will rely in the prosecution of their appeal in the above entitled cause.

I.

That the court erred in excusing the jury and in questioning the witness, Richard Kelley, and by striking the bench with his fist and by conducting himself in such a manner, during such questioning, as to terrorize and intimidate the said witness Kelley, in the absence of the jury, and to frighten the said witness Kelly into testifying in part as it is apparent from the record the court desired him to testify.

II.

That the court erred in refusing to allow counsel for the defendants, or any of them, to interrogate the witness Kelley out of the presence of the jury, after the court had questioned such witness out of the presence of the jury.

III.

That the court erred in then questioning the witness Kelley in the presence of the jury after the court had, out of the presence of the jury, intimidated the said witness Kelley as aforesaid.

IV.

That the court erred in intimidating the witness Charles Cruse by ordering the arrest of the witness Kelley at

the conclusion of the testimony of the witness Kelley, because the court was not satisfied with the testimony of the said witness Kelley.

V.

That the court erred in excusing the jury and in questioning the witness Amsbaw in such manner as to intimidate the witness Amsbaw.

VI.

That the court erred in then questioning the witness Amsbaw in the presence of the jury after the court had, out of the presence of the jury, intimidated the said witness Amsbaw as aforesaid.

VII.

That the court erred in denying the motion of each of said defendants for a directed verdict of not guilty, made at the conclusion of the government's case and renewed at the close of the entire case, which said motions were made upon the ground of the insufficiency of the evidence as to each defendant and as to each and every count of the indictment.

VIII.

That the court erred in refusing to give the jury instructions numbers 1, 9, 11 and 14, which instructions were requested by all defendants, and to which refusal the said defendants excepted.

IX.

That the court erred in instructing the jury as a matter of law that there was sufficient evidence in the record to justify the conviction of each and every defendant charged in the indictment as to each count.

X.

That the court erred in permitting counsel for the government to misquote the evidence, and in refusing the defendants' request to instruct the prosecuting attorney not to misquote the evidence, and in refusing to instruct the United States attorney to correct his misstatements, which said misstatements were specifically pointed out to the court and excepted to.

XI.

That the court erred in his language and manner in criticizing counsel for the defendants for calling such errors to the attention of the court.

XII.

That the court erred in accusing counsel for the defense of questioning the court's veracity with reference to the written statement of the witness Amsbaw which was admitted in evidence as special exhibit admitted by direction of the court.

XIII.

That the court erred in refusing to instruct the jury to disregard the statement that counsel for defendants had questioned the court's veracity.

XIV.

That the court erred in denying the defendants' motion to strike out and to instruct the jury to disregard the court's statement purporting to disclose the contents of the said written statement of the said witness Amsbaw.

XV.

That the court erred in permitting the United States attorney to state in the presence of the witness, Cruse,

an employee of the witness, Kelley, that the said Kelley had said "Well, they didn't get anything out of me. I could not read or write and they wanted to give me some glasses to read with and I had my glasses in my pocket all the time."

XVI.

That the court erred in not permitting counsel for defendants to cross-examine the witness Kelley with reference to an impediment in the speech of the person referred to in the testimony of said Kelley as P. Walker.

XVII.

That the court erred in advising counsel making objections on behalf of the defendants that he was "too sensitive" about misstatements of the United States attorney in his closing argument when said counsel called the attention of the United States attorney to misstatements of the evidence with reference to the testimony concerning the teams which had been rented by the defendant Bruno, and further erred in suggesting that said counsel "take something" for said sensitiveness.

XVIII.

That the court erred in permitting the United States attorney in his closing argument to make the statement that the defendant, Quirin paid for the team with which the seeding about the still was done.

XIX.

That the court erred in refusing to instruct the United States attorney not to misquote the evidence with reference thereto.

XX.

That the court erred in permitting the United States attorney to repeat said misstatement after his attention had been previously directed to it, and in criticizing counsel for the defendants for so directing his attention.

XXI.

That the United States attorney was guilty of misconduct in stating inferentially in his opposing argument that Herman Quirin had a herd of 800 goats and that said goats were to be used in connection with a cheese factory. That the court was guilty of misconduct in criticizing counsel for the defendants for calling the attention of the court to the said misstatement and in stating "he (the United States attorney) is not making any misstatement".

XXII.

That the United States attorney was guilty of misconduct in stating in his closing argument "and when Mr. Herron, the former district attorney of the United States, makes that statement, I am forced to say that is because he is employed by the defendants and he is obliged to defend them at any cost".

XXIII.

That the court was guilty of misconduct in stating during the closing argument of the United States attorney with reference to the remark in assignment No. XXII, "I think there has been unusual aggravation of Mr. Ohannesian and he naturally yielded to it, but I hope he will be permitted to continue with his argument and I hope he will not permit himself to be aggravated by

these unnecessary and irritating interruptions in making some extravagant remarks hereafter."

XXIV.

That the court erred in instructing that the proof offered by the government, if uncontradicted and unexplained, would justify a conviction of all of the defendants.

XXV.

That the court erred in instructing the jury that the jury would be warranted from the evidence in concluding that Quirin permitted water to be taken from his premises knowing that it was to be used in a still.

No. 6124

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Peter Connley and Herman F. Quirin,
Appellants,

vs.

United States of America,
Appellee.

REPLY BRIEF OF APPELLEE.

SAMUEL W. MCNABB,
United States Attorney.

J. GEO. OHANNESIAN,
and
WILLIAM R. GALLAGHER,
Assistant United States Attorneys.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

No. 6124

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Peter Connley and Herman F. Quirin,
Appellants,

vs.

United States of America,
Appellee.

REPLY BRIEF OF APPELLEE.

This is an appeal from a judgment of conviction in the District Court of the United States for the Southern District of California by appellants Peter Connley and Herman F. Quirin, who, together with Nick Bruno, and Joe Verda (the latter two, Nick Bruno and Joe Verda, were acquitted by the jury) were tried jointly in an indictment charging in six counts as follows:

1. A violation of section 37 of the Federal Penal Code; that is, a conspiracy to transport, manufacture and possess large quantities of intoxicating liquor in violation of the National Prohibition Act.

2. Unlawful manufacture for beverage purposes of about 1300 gallons of intoxicating liquor in violation of

section 3, Title II of the National Prohibition Act of October 28th, 1919, as amended March 2nd, 1929.

3. The unlawful possession of a still and distilling apparatus, with the knowledge that said still and distilling apparatus had not been registered by said defendants as required by law.

4. The unlawful engagement in and carrying on of the business of distillers without having given bond as required by law, with intent to defraud the United States of America of the tax on spirits distilled by them, in violation of section 3281, United States Revised Statutes.

5. The unlawful making and fermenting of mash fit for distillation and for the production of spirits and which said mash was not then and there intended to be used in the manufacture of vinegar exclusively or at all, in violation of section 3282, United States Revised Statutes.

6. The unlawful possession of about 1300 gallons of intoxicating liquor for beverage purposes, in violation of section 3, Title II of the National Prohibition Act of October 28th, 1919. [Tr. pp. 2-11.]

The appellant Peter Connley was convicted on all counts. Appellant Herman Quirin was convicted on the first count, charging conspiracy and acquitted on the remaining counts of the indictment.

A motion for new trial on behalf of each of the appellants was made and denied. Sentence was thereupon imposed upon Peter Connley as follows:

> "To be imprisoned in the United States Penitentiary at McNeil Island, Washington, for a term of one year and two months on the first count;

two years on the second count; one year and two months on the third count; one year and one month on the fourth count and one year and one month on the fifth count. Sentences to run consecutively, making a total sentence of six years and six months and in addition thereto, pay a fine into the United States of America in the sum of $4,000.00, and court costs taxed at $947.22, and with respect to the sixth count, it appearing that this does not involve imprisonment, a maximum fine of $500.00 which the imposition of fine of $4,000.00 covers. It is the further judgment of the court that said defendant stand committed until said fine of $4,000.00 and costs shall have been paid."

The defendant Herman F. Quirin was sentenced to be imprisoned "in the United States Penitentiary at McNeil Island, Washington, for the term and period of twenty-one months on the first count and in addition thereto pay into the United States of America fine in the sum of $1,000.00 and court costs taxed at $947.22 and stand committed until said fine and costs shall have been paid." [Tr. p. 40.]

STATEMENT OF FACTS.

The statement of facts set forth in appellants' opening brief is, in the main, correct. The statement, however, is rather lengthy and embodies numerous references to the testimony adduced at the trial. Ordinarily, it is not customary for the appellee to submit a detailed statement of facts; nevertheless, we deem it advisable in view of the length of appellants' statement to narrate the testimony of two Government investigators, O. G. Spencer and William P. Clements, in order to fully advise this

Honorable Court of the facts. Government witness, O. G. Spencer, was called on the 25th day of March, 1930, and testified as follows:

"The Witness: I have gone out to the Bruno Ranch about five times altogether. The last time was yesterday and I was out there last Saturday. The first time I was there I arrived about 11 o'clock in the morning of January 24, 1930, three days after the raid. I went alone as far as Elsinore, where I picked up Chief of Police Barber, who went with me. I made an investigation of everything that I could find or see from the highway by Mr. Quirin's home, through the Bruno Ranch and around the still and around the house and all the sheds and everything that I could find that had any bearing on the case. I know where the mine pit is located. On the first day I was there I examined the pipeline and the water system from the pumps down in the mine all the way to the Bruno house and to the still. There was no other pipe connection or no other source of water supply to the still itself that I could find other than this pipeline, except there was a portable system. They could have hauled water in a wagon or something; but there was no regular pipeline system. That was the only permanent means of water supply. From the mine the pipeline runs in an almost direct course to Mr. Bruno's ranch and right straight south from the north fence on his ranch to a concrete pit right back of the house. It ran over farming ground across Mr. Bruno's place, and across Quirin's place. Grain had been planted on the land through which this pipeline passed but it had not sprouted yet. Yesterday was the last time I went out there and observed that there was grain growing. There were either four or five places that

the pipe cropped out of the ground from the mine to the concrete pit. Three of those were inside of the fence in the field of grain—cropped out in three places in the field. The pipeline ran from about 8 inches below the ground to the surface of the ground, and in some places it stuck above the surface just a little bit. There was a pipeline running from the fuel tank buried in the ground directly in front of the shed near the Bruno house direct to the still pit and the pit of the boiler. It ran through the planted field. The pipe showed up for 15 or 20 feet between the tank and the still up near the fuel tank. After it left the gasoline tank or reservoir it went to the burner under the boiler in the still pit. I followed the pipe all the way except right for a little distance. On the roof of the still pit it was covered up in the dirt before it came through the wood. I saw where it was connected at the far end to the fuel tank. The buried tank was a little over half full of fuel.

In the shed that was on the hill near the Bruno house I examined the oil drums and found 60 altogether. All of them had marked on one end, 'No. 2, Dist.' I don't know what that 'Dist.' stands for. That was stencilled on the end. There was one similar drum, painted the same color, with the same marking on the end, at the Quirin home near the road when I arrived there; and it was there for one or two weeks after my first trip there. The Quirin home was right adjoining the Elsinore-Perris highway near the mine. I went down into the still pit and made an investigation there, finding some large wooden fermenting vats and some galvanized tanks. Six of these vats were practically full to six inches of the top with mash, most of it fermenting. I figured the capacity of those vats to be between 8,000 and 9,000 gallons each. This mash was fer-

menting and boiling pretty lively. I poisoned it to stop that. At that time I noticed there were galvanized iron tanks in the pit. Two of them were connected up and the other was disconnected. The two that were connected up were practically empty; but there was very little liquor in the bottom, dripping out of the spigot, when I opened it. I went out there yesterday primarily to take Mr. Kruse to see if he could identify that boiler base; and I made a very casual investigation as to the lumber or timber that was used in the Quirin house, as I had examined that very thoroughly before. I made an investigation of the lumber that was used in the mine pit and. likewise, the timber or lumber that was used in the still pit. I was in court when the Government offered in evidence tags as to items of lumber sold to Quirin.

In the still pit there were 4x4s, 2x4s and 2x12s. There were two or three 8x8s and several 6x6s. I did not find any like dimensions in the house known as the Quirin house. I did find in the mine pit some 2x2s and some 2x4s. I did not find any 4x4s in the mine pit. They were in the still pit next to the boiler on the east side of the pit. When I took Mr. Kruse there yesterday I examined the boiler base right at the still. The boiler base was lying within about 20 feet of a pile of hay over the still. That was the dismantled boiler outside."

The testimony of Government witness W. P. Clements was as follows:

"I am a federal prohibition agent. Have held that position for two years, being in that position in January and February of this year. I have seen the defendant Verda before; also the defendant Bruno. First saw one of them on a ranch about five miles east of Elsinore, known as the Bruno Ranch in that

district, that being the premises testified to by Officer Spencer. The first time I was in Elsinore was along about the 15th of January of this year, and I was in the company of three other agents then. Their names were Agents Short, Schermerhorn and Alles. On this first occasion I did not see any of the defendants. The next time I went there was January 21st. Agent Alles was with me. It was between 1 and 2 p. m. in the afternoon when I arrived at the Bruno Ranch. I first saw the defendant Joe Verda. He came out of the house on the ranch marked 'E' on the map and walked down to the road with a red handkerchief in his hand. We were driving in an automobile and he came out of the door on the side of the house. We were probably two or three hundred feet away between this gate and the house. He walked on down the road we were coming in and he walked almost directly in front of the car and waved the handkerchief like this (indicating) to stop the car; and we didn't stop. We pulled on around him and drove clear around the side of the house and in back of the house marked 'E'. The defendant turned around and came back up to the house. I did not see the defendant Bruno at that time. At that time Verda didn't say anything. He came up to the house and the defendant Pete Connley, or George Walker—he gave his name as George Walker, the heavy set gentleman there at the corner of the table by Mr. Doherty, the assistant United States attorney—came out of the other door of the house. There are two doors, one on the south side and one on the north side of the house. The house is set east and west. He came out of the other door where we had driven almost directly behind the house. When we stopped he came out and he, Walker, otherwise Pete Connley, spoke to me and I told Mr.

Walker who I was. He said, 'Good afternoon,' I believe it was. We passed the time of day. I don't remember the words he used. And I immediately told him who I was. I told him I was a federal prohibition agent and had information that there was a still on this ranch and that I would like to look around. At this time Agent Alles and the defendant Verda were standing close to the house, probably 5 or 6 feet away. Mr. Connley said he didn't know of any still around there and that we were perfectly welcome to look around, and to come on in the house. I told Connley there was nothing in the house I wanted to see; that, if the still I had heard was around there, it wouldn't be in the house. He said, 'Come on in anyway.' And we went in the house, walked through the house, and in a small room we found a boiler for a still, I should judge a 150-gallon copper boiler. It was not in use. This was a boiler around 5 feet high and about 30 inches across, I should judge, with a connection in the top. There was nothing connected to the top. There were no coils. There was a connection for the fitting. It wouldn't be a pipe fitting but it was a joint. It had a cover like this and a round hole in the top of it; and, if I remember right, there was a connection for a bolt joint fitting. I had seen something like it before, having been in the prohibition two years. I have seized between 40 and 50 illicit stills and I would say it was a boiler for a still. It had been used but not recently, the fact that it was smoked on the bottom indicating that it was used. There was no mash or anything on the inside. It had been washed out clean. Agent Alles, the defendant Peter Connley and myself turned around and came out of the house and walked over to a shed possibly 50 feet from the house. Verda stayed close to the

house. He didn't stay in the house. He came out and stayed around close to the outside of the house. We walked out to this distillate shed (marked 'H'); and it was practically full of 50-gallon distillate barrels. I walked over to one of these and shook it and it was full of distillate. It was a 50-gallon iron barrel, the regular iron barrels they use for oil. At the same time I saw this buried tank in front of the shed (marked 'I'). I saw the top of this tank; and I walked back over to the defendant Connley and said, 'Well, where is it at'? He said, 'I don't know that there is anything around here.' So Agent Alles and the defendant Connley and Verda, he having come out where we were about that time, and there being a very well defined road down this hill between the shed and the house, the road that ran down to the still—I said, 'Let's walk down this road and see what there is here.' So Agent Alles, the defendant Connley and the defendant Verda and I started down the road. Verda stopped about half way down to the still and Connley and Agent Alles and myself proceeded on down to the still location. We got to the top of the hole. And I asked the defendant Connley what was down in this hole. He didn't answer but he started on down the ladder of the hole; and he stopped at the top after he had taken a couple of steps on the ladder, his head being still above the hole, and said, 'There is no use of you fellows coming down in here. We can fix this up all right. I know the owner of the still and we can all make some money on it.' So I told the defendant Connley we would go on down; that money wasn't what I was there for. And we went down to the still. And there was about seven or eight thousand gallons of mash. It was about 8x12, 8 foot high and 12 foot across, approximately a thousand-gallon still, and

some alcohol. I didn't know how much at that time. It later turned out there was one hundred and fifty 5-gallon cans. There were 25 5-gallon cans sitting on the floor, 625 gallons and a cooling tank. After we came back up out of there I immediately arrested the defendant Walker, or Connley. He gave the name of Walker. George Walker was the name I knew him by. Agent Alles and the defendant Walker and I came back up to where Verda was standing; and we arrested him, too, at that time and walked on back up to the house. When we went down to the still, that is, Agent Alles, Walker, Verda and I, there was a truck sitting back of the Bruno Ranch house marked 'E'. As we started down there there were two or three gentlemen in the field down below the house at the time working on something, either a pipeline or on some lumber that was there. One of these gentlemen came up and got on this truck when we were about half-way down to the still. He started the truck up and drove it off. As soon as Alles, Walker, Verda and I came back to the house I asked Walker what his connections were there and he said he was building a water tank. There was some lumber there which he was working on. He said that he was a contractor. I asked Verda what his connections were there and he said he was hired to take care of the ranch, the mules and the house; was getting $30 a month for doing it; that a man by the name of Frank Ramiro hired him; that he had been there about four days. The defendant Connley stated that he had been there about ten days. The defendant Connley didn't ask me how much money I was making a month at that time. He asked me if there wasn't some way that he could fix this up; that there wasn't any use of anybody going to jail over a place like this; that there

was too much money invested; that it would be easy for all of us to make money. I did not observe the defendant Verda do anything while I was there except when we came up there he tried to stop us by waving his handkerchief at us and getting out in the road in front of us. That is the only thing he did while I was there. I left as soon as I had this conversation with the defendant Connley and the defendant Verda and followed this truck. I had the license number of the truck, having taken it when I went up there. I followed it over to the house on the highway that was occupied by the defendant Herman Quirin, the house marked 'B'. This truck drove up in the rear of that house and stopped, being stopped when I was there. I didn't see it come in but I followed it over there; and it was setting there when I got there. I stopped and went over to the truck. There was nobody around the place and I walked on in the house and there was nobody in the house. The house was furnished. At that time I didn't know whether this house was on the same ranch with the still or whether it was two different ranches. And I came out and went to Elsinore and called the prohibition department for help and at the same time met Chief of Police Barber. I had taken the rotary off this truck, off of the distributor of this truck, so that they couldn't move it. I was probably gone forty minutes. Chief of Police Barber and I came back from Elsinore to this house. And the truck was gone and the defendant Herman Quirin was there shaving when we walked into the house, into Quirin's own home, the house on the highway marked 'B'. There was nobody there but him. When I walked in he said, 'What do you mean by coming in here'? I said, 'I have come over after you.' The defendant Quirin said, 'What are

you going to do? Take me over and set me on the spot'? So I told him I wasn't setting anybody on the spot; that, if he was guilty, I wanted him, and if he wasn't guilty I didn't want him. So I asked him what became of the truck. He said, 'Well, the man that owned the truck took the truck away.' I said, 'Do you know the man that owned the truck'? He said, 'I saw him a few times.' I said, 'Well, who was he'? He said, 'Well, I don't know him by name but I know him when I see him.' We waited until Mr. Quirin got through shaving, he being about a half or a third through, having just got his face lathered and had taken just about one scrape with the razor. We took him over to the still with us. All of the defendants made the statement that this ranch was the Bruno Ranch and that Nick Bruno owned it. I told Chief of Police Barber, if he knew where Nick Bruno was, to take my car and go get him. He didn't have any car. It was a government car we were using. So he took that car and proceeded back to Elsinore and in an hour or a little more the constable came. I do not know his name. He came back with Nick Bruno and some goats on a truck. So Agent Alles went with Bruno to take the goats wherever he, Bruno, was going; and then Bruno and Agent Alles came back. After we came back from Elsinore we stopped at Quirin's home, marked 'B', and picked him up and came over to the Bruno Ranch, Bruno being the last man to come there, he coming there when he was brought there by the constable. At the time I went into the house marked 'E', the Bruno house, I was invited in the house by the defendant Connley. And at that time I did not see an electric bell on the wall, but the first time I was in the still I saw a bell in the still on a post. I had never found the push button yet the

first time I was in the house. Later that afternoon this bell and other apparatus was traced out by Chief of Police Barber and Mr. Piles of a newspaper out there; and they traced it back to the house and showed it to me. It was in the room next to the dining room. The bell was on the side of a 2x4 if I remember, on a joist that ran up; and they had nailed a board over this to cover up the button and you had to reach around this board to get around to push the button. I did not operate it to see whether it worked or not. I don't remember any of the defendants making any statements to me.

They were taken in two carloads to the Elsinore jail, there being Assistant Administrator Peters and Investigator Noe and Agent Alles and Investigator Rhodes, Chief of Police Barber and the constable. We left them at the Elsinore jail; and I did not at any time after that date have any conversation with the defendants."

Specification of Error Urged and Argued by Appellants Peter Connley and Herman F. Quirin.

1. That the third count of the indictment does not state facts sufficient to constitute any offense against the United States.

2. That the offenses charged and attempted to be charged in the second, third, fifth and sixth counts of the indictment are component parts of, and necessarily included in, the offense charged in the fourth count of the indictment, and sentences on each of said second, third, fourth and sixth counts, to run consecutively constitute double jeopardy and result in five different punishments for the one inclusive offense.

3. That the court was guilty of misconduct prejudicial to the rights of appellants in its examination of the witness Kelly.

4. That the court erred in refusing to allow counsel for the defendants, or any of them, to interrogate the witness Kelley out of the presence of the jury, after the court had examined him out of the presence of the jury.

5. That the court erred in limiting the cross-examination of the plaintiff's witness, Albert Kruse.

6. That the court erred in admitting in evidence the written statement of the witness Amsbaw, and in commenting on the contents thereof and was guilty of misconduct in its examination of this witness.

7. That the court erred in denying the motion of the appellant Quirin for a directed verdict of not guilty, made at the conclusion of the Government's testimony and renewed after the defendants had rested.

8. That the United States attorney was guilty of misconduct in his argument to the jury, which misconduct was prejudicial to the rights of appellants.

9. That the court misdirected the jury.

ARGUMENT.

I.

The Third Count States Facts Sufficient to Constitute an Offense Against the United States.

The first point urged and argued by appellants Connley and Quirin is that the third count of the indictment does not state facts sufficient to constitute an offense against the United States. The third count of the indictment charges as follows:

"That the defendants * * * did knowingly, wilfully, unlawfully and feloniously, have in their possession and custody and under their control, one still and distilling apparatus set up at or near the said ranch of Nick Bruno, the legal description of which is as follows, to-wit * * * which said still and distilling apparatus had not been registered by the said defendants with the Collector of Internal Revenue for the Sixth Internal Revenue District of California, and the said defendants, at the time they did so knowingly, wilfully, unlawfully and feloniously have in their possession and custody and under their control the said still and distilling apparatus, then and there well knew that the said still and distilling apparatus had not been registered with the said Collector of Internal Revenue as required by law." [Tr. p. 7.]

and as correctly stated by counsel for appellants, this charge is laid under Revised Statutes, section 3258, 26 U. S. C. A. 281, which provides:

"Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is, by subscribing and filing with him duplicate statements, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence and the purpose for which said still or distilling apparatus has been or is intended to be used; one of which statements shall be retained and preserved by the collector, and the other transmitted by him to the Commissioner of Internal Revenue. Stills and distilling apparatus shall be registered immediately upon their being set up. Every still or dis-

> tilling apparatus not so registered, together with all personal property in the possession or custody, or under the control of such person, and found in the building, or in any yard or inclosure connected with the building in which the same may be set up, shall be forfeited. And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500 and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years. (R. S. 3258.)"

That in view of the change in the law as to the person with whom stills should be registered, that a charge as set forth in the indictment does not state an offense against the United States; that after the passage of the Reorganization Act, it was no longer required that one in the possession or custody or control of a still which had been set up, register it with the Collector of Internal Revenue and failure so to register such still is no offense and that an indictment charging such a failure and not charging the failure to register such still with the Prohibition Administrator as required under Article 18 of Regulation 3, promulgated by the Secretary of the Treasury on October 1st, 1927, we would concede the point made by counsel were it not for the fact that there is no fundamental difference in the law which now requires that a still must be registered with the Secretary of the Treasury and the officers whom he shall designate. In our opinion the essence of the offense being the unlawful and felonious possession of unregistered distilling apparatus which the evidence showed beyond a shadow of

doubt was in the possession of the defendants nor was there any evidence that any attempt was ever made to register same as required by law on the part of the defendants but on the contrary, the evidence tended to show that the appellants surreptitiously possessed and maintained the still in question. This objection to the indictment is raised for the first time in the appeal of appellants from the verdict and judgment of the court and as stated in the case of *United States v. Diebella* (28 Fed. (2nd) 805), an objection that the indictment charged the crime of possessing registered still in the language of Revised Statute No. 3258, requiring those in possession and custody and control of a still to register them with the collector of the district instead of as provided by Regulation 3, Article XVIII, promulgated by the Prohibition Commissioner on October 1st, 1927, requiring proprietors, distillers and others to register stills with the Prohibition Administrator when not raised at the time of trial cannot be raised for the first time on appeal.

II.

The Sentence Imposed on Counts Two, Three, Four, Five and Six Do Not Constitute Five Punishments for One Offense.

Counsel next contend, in point two of their argument, that the offenses charged in counts two, three, five and six are component parts of and included in the offense charged in the fourth count of the indictment, and that the sentences imposed on all of such counts constitute five punishments for one offense. It should be noted at the outset that no demurrer was interposed to the indict-

ment on that ground, nor was any motion made for election directed to those five counts. No exception was taken to the admission of evidence or to the instructions of the court on these charges. It is, therefore, unnecessary for this Honorable Court to now pause to inquire whether these several offenses charged are in fact but one. This Honorable Court, speaking through Judge Gilbert, has announced the rule in *Kuehn v. United States,* 8 Fed. (2d) 265, as follows:

> "On an information which contained five counts, the plaintiff in error was convicted under the first two, the one charging him with the unlawful possession of a pint of moonshine whiskey on July 2, 1924, and the other charging him with the unlawful sale of a pint of moonshine whiskey on that date. He contends that the two offenses so charged are, in fact, but one, and he assigns error on the ground that he is twice punished for a single offense. We need not pause to inquire whether the two offenses are in fact but one. No demurrer was interposed to the information on that ground, nor was any motion made for election, and no exception was taken to the admission of evidence or to the instructions of the court on these charges. Bilboa v. United States (C. C. A.), 287 F. 125."

It is true that a motion was made requiring the Government to elect whether it would proceed on the second or fifth count, which said motion was properly denied, for the reason that the second count charged the appellants with manufacture of intoxicating liquor under the National Prohibition Act as amended, and the fifth count charged the appellants with feloniously making and fermenting about fifty thousand gallons of mash on certain premises other than a distillery. No motion to elect, however, was directed to count four, which count the

appellants now claim embraces the offenses charged in counts two, three, five and six. This we deem a sufficient answer to appellants' second point.

There is, however, a further answer to appellants' second contention. Assuming, but not conceding, that the offenses charged in the second, third, fifth and sixth counts are embraced in the fourth count, the total sentence of imprisonment imposed by the court on all counts amounted to six years and six months. [Tr. p. 39.] This constituted but one sentence. *Koth v. United States,* 16 Fed. (2d) 59. The court might have imposed a total sentence of seven years on the first and second counts charging conspiracy and manufacture. Then, assuming that counts two, three, four, five and six are all merged, the total sentence imposed of six years and six months is still within the limit that might lawfully have been imposed by the court on counts one and two. As was said in *Koth v. United States, supra:*

> "Where conviction is had upon more than one count, the sentence, if it does not exceed that which might be imposed on one count, is good if that count is sufficient. Wetzel v. United States, 233 F. 984, 147 C. C. A. 658."

This argument applies with equal force to point one, urged by appellants.

We do not consider, however, that the offenses charged in the second, third, fourth and fifth counts are but one offense, and counsel has nowhere in his brief cited authority directly to that effect, and attempts to reason from analogous cases. We submit there is no merit in appellants' second contention.

III.

No Misconduct Was Committed by the Court in Its Examination of the Witness Kelly.

Appellants in the third assignment of error claim the court was guilty of misconduct prejudicial to the rights of appellants in its examination of the witness Kelly. As stated by counsel for appellants, Richard Kelly was called March 19th, 1930, as a witness for the Government and recalled by the Government on March 25th, 1930. This witness was called for two purposes; first, to prove that appellant Connley was the man who purchased the 30 H. P. boiler which was at a later date found at the still; secondly, to identify him as being one of the parties who called for and took away the boiler in question. All of the cases cited by counsel in support of their third assignment of error are upon the right of cross-examination of one's own witness without laying the foundation required for cross-examination of one's own witness. We respectfully submit that this witness was recalled at the instance of the court and not by counsel for the Government and after the examination of Government witness Albert Kruse, an employe of Kelly. The court, of its own motion, being of the opinion that the witness Kelly made every effort to evade answering the interrogatories put to him by counsel for the Government as well as those of the court, took upon himself the questioning of the witness Kelly in order that the true facts in the case might be placed before the jury and it hardly behooves counsel for the defendants to even intimate that the court used methods other than were honorable and proper in the premises.

It will be conceded that it is the judge's duty to see that justice is done and where justice is liable to fail because a certain fact has not been developed or a certain line of inquiry has not been pursued, it is his duty to interpose, either by suggesting to counsel or by an examination conducted by himself, avoid the miscarriage of justice, especially where the witness is reluctant or evasive and it seems to us the height of folly for appellants, if not impudent on their part, to question the integrity and motive which prompted His Honor, Judge Killits, learned in the law and honorably retired after twenty-five years of active service as Federal District Judge, and it ill becomes our young but energetic friends, espousing the cause of appellants to assume that His Honor pursued the course that he did for any other purpose than to prevent a miscarriage of justice. Counsel in support of their contention that the court was guilty of misconduct prejudicial to the rights of the appellants, in its examination of the witness Kelly, cites at length the case of *Allen v. United States,* 182 Fed. 464, but in considering his case, it is well to bear in mind that the act complained of in the case cited, took place in the presence of the jury, while in the case at bar, *none of the acts complained of took place before the jury.* It thus appears that if there were any irregularities either in the conduct of His Honor or that of the Government attorney during the absence of the jury, it could in no manner have affected the jury in its final consideration of the case, and therefore cannot be successfully contended that it was prejudicial to the rights of appellants. The court in the case cited stated that while a trial judge in the exercise of his discretion to expedite the trial may participate in the examination

of witnesses, he should do so in such a manner to impress the jury with the idea that he was entirely impartial and so as to avoid the appearance of being an advocate of either side. This, in our opinion, was the attitude of the learned judge who presided over the case at bar. It apparently was not the case in the case cited by counsel, for the learned court went on to say:

> "The Circuit Court of Appeals is reluctant to interfere with the exercise of the discretion of the trial judge in participating in the examination of witnesses but will do so when the judge's examination has been conducted in a manner so hostile to the defendant and his witnesses as to appear to produce in the minds of the jury the impression that the judge has a fixed opinion that the defendant is guilty and should be convicted."

Such, however, was not the conduct of the able judge who presided at the case at bar; first, for the reason that the acts complained of were in the absence of the jury and secondly, that the conduct of the judge throughout the entire trial was eminently fair and could not have impressed the jury with any idea save and except that the defendant should have a fair and impartial trial.

In the case of *Callahan, et al. v. United States,* 35 Fed. (2d) 633, objection was made to the language of the court as addressed to counsel appearing for appellants, the court having made the following statement:

> "That is one reason why you should not be entitled to practice in this court. I certainly won't open it up. Sometime, some place you took an oath. When you say you want to file a demurrer that you say yourself is not true, you are violating that oath."

The court in commenting upon this phase of the case stated as follows:

> "It is unnecessary to consider whether this language was justified as no exception was saved to it for review by this court. No prejudice to the defendants was shown as the remarks were made wholly to counsel. A jury had not been called and it doesn't appear that any of the trial jurors even heard the remarks or could have been influenced to any extent. The cases of Allen v. United States, 115 Fed 3, and Grock v. United States, 289 Fed. 544, on which appellants rely, therefore have no application."

We fail to see how any of the cases cited by appellants commencing with the case of *Glover v. United States*, 147 Fed. 426, to and inclusive of case of *Rutherford v. United States*, 250 Fed. 855, nor the case of *People v. Mahoney*, 201 California, 618, can be at all considered as supporting counsel's contention for the reason that in all the cases cited, the alleged errors, if any, were committed in the presence of the jury and were by the court held prejudicial to the rights of the appellants in that the court had so conducted itself as to have impressed the jury with the idea that the judge thereof had a fixed opinion that the accused was guilty and should be convicted. In the case at bar, the court interrogated a reluctant witness and same was conducted without prejudice to defendant; therefore the court acted within its discretion.

Swan v. United States, 295 Fed. 921.

It is respectfully submitted that no error was committed by the court in its examination of the witness Kelly and that the defendants did have a fair and impartial trial.

IV.

The Court Did Not Err in Refusing to Allow Counsel for Defendants, or Any of Them, to Interrogate the Witness Kelly Out of the Presence of the Jury After the Court Had Questioned Such Witness Out of the Presence of the Jury.

In our opinion, the examination of Kelly by the court out of the presence of the jury was not a part of the trial, therefore not subject to the cross-examination on the part of counsel for appellants and even if allowed could in no way assist the jury in its final deliberation. The case of *Calahan,* 35 Fed. (2d) 633, may again be cited in support of our contention that the court had the right to deny the request of appellants to examine the witness Kelly out of the presence of the jury in that the same and the whole thereof would not be relevant nor would it assist the jury in arriving at a just verdict. The court in the case cited made this observation:

> "We fail to find that the questions asked by the court were sufficient to indicate any opinion relative to the guilt or innocence of the accused. The contention that the court unduly limited the examination of witnesses is also without merit. The purpose was obviously to avert unnecessary repetition and confine the inquiry to relevant matter. We think the rulings were well within the proper discretion of the court. In any event, we are convinced the guilt of the defendants was clear and their substantial rights were not adversely affected."

Counsel for appellants do not contend in their fourth assignment of error that the alleged error in refusing to allow counsel for defendants to interrogate the witness

Kelly in any way prejudiced the case nor deprived the defendant of any of its substantial rights nor that if counsel were permitted to interrogate the witness, the result thereof would have in any wise affected the final termination of the case.

V.

The Court Did Not Err in Limiting the Cross-Examination of Plaintiff's Witness Albert Kruse.

That a witness may not be cross-examined on other matter on which he may have testified on direct examination is elementary, notwithstanding counsel's statement to the contrary.

It is true that by the English rule which is followed in several of the states, a witness who is sworn and gives some evidence, however formal or unimportant may be cross-examined in relation to all matters involved in issue, but a stricter rule, sometimes called by way of distinction, the "American rule", obtains in the federal and very many of the state courts. Under this rule the cross-examination of a witness is limited to an inquiry as to the facts and circumstances connected with the matter stated in his direct examination and much is left to the discretion of the trial court.

VI.

The Court Did Not Err in Admitting in Evidence the Written Statement of the Witness Amsbaw and in Commenting on the Contents Thereof, and Was Not Guilty of Misconduct in Its Examination of This Witness.

Appellants herein complain that the court erred, first, in admitted in evidence the written statement of the witness Amsbaw, and secondly, in commenting on the contents thereof, and that as such, it was misconduct on the part of the court in its examination of the witness

relative thereto. The copy of the statement referred to was ordered admitted in evidence over the objection of counsel for appellants [Tr. p. 160], and was by the clerk marked "Special Exhibit introduced by order of Judge". Here again the alleged error, if any, was committed out of the presence of the jury, and upon a subject matter, to-wit: the written statement which only related to the activities of one Nick Bruno, a co-defendant who was acquitted by the jury. It is true that the name of Quirin incidentally appears in the statement, but taking the entire statement as a whole, it merely relates to the defendant Quirin, and the fact that he was acquitted is sufficient proof of the fact that the introduction of the statement and any comments thereon made by the court in the absence of the jury did not affect the jury in its final determination of the case in so far as any of the appellants herein are concerned.

Here again counsel for appellants find fault with the conduct of the presiding judge because of the fact that the court took upon himself in the absence of the jury to question the witness Amsbaw, solely for the purpose of refreshing the defendant's recollection as to what Bruno had said. Counsel seems to object to the fact that the examination was conducted out of the presence of the jury and by the court instead of counsel for the Government.

We respectfully submit that if the court in his opinion was convinced that counsel for Government failed to properly present the facts involved, that the court had full authority in furtherance of justice to take upon himself the task of examining a witness, and as it ap-

peared in this case the court did not, by its examination, intimate the guilt of any one of the defendants, nor was the jury advised of what transpired in its absence. It necessarily follows that the jury was not in any way affected in its final determination, and it ill becomes counsel to even suggest that the court was in any way prejudicial or unfair in its cross-examination of the witness referred to.

VII.

The Court Did Not Err in Denying a Motion of Appellant Quirin for a Directed Verdict of Not Guilty Made at the Conclusion of the Government's Testimony and Renewed After the Defendant Had Rested.

Counsel for appellants predicate this alleged assignment of error upon the ground of the "insufficiency of the evidence". Motion was duly made before and after the case was concluded by the Government, was denied and exception taken thereto. [Tr. p. 31.] We respectfully call the court's attention to the wording of the ground of objection, to-wit: "insufficiency of the evidence", which of itself presupposes that there was evidence submitted to the jury, but that counsel's objection goes as to the sufficiency thereof, a matter in our opinion to be passed upon by the jury who are the judges of the facts as covered by the law in the case.

It is well to bear in mind at this point that there is a distinction to be drawn between insufficiency of the evidence to support a verdict of guilty, and the legal insufficiency of the evidence to support a verdict of guilty. The objection does not go to the legal insufficiency, but

merely to the sufficiency of the evidence to sustain a verdict, but as stated above, the jury is the sole judge of the facts, and this is as it should be, for the reason that the trial jury had before it all of the witnesses could observe their demeanor, the reasonableness of the story, the opportunity of the witnesses of knowing the things about which they testified, the interest or lack of interest in the results of the trial, and all other disclosed circumstances bearing upon the credibility of the witnesses, and they alone could determine where the guilt in the case lay, and if there is any evidence upon which rational minds might arrive at a right conclusion, we respectfully submit that this court can not reverse, and should not reverse, the findings.

Counsel in support of their contention that the court should have granted their motion for a directed verdict, cite the case of *Sugarman v. United States*, 35 Fed. (2nd) 663, wherein several defendants, including Sugarman, were charged with conspiracy to violate the National Prohibition Act by possessing and transporting intoxicating liquors in certain counties in Southern California.

The motion in the above case for a directed verdict was as to the defendant Williams, wherein the facts were as follows:

The testimony tending to connect the appellant Williams with the commission of the offense is inconclusive and unsatisfactory. He was referred to on different occasions as one of the parties employed by the conspirators in the transportation of liquor from boats offshore to land, but this testimony was not sufficient to connect him with the conspiracy, and was not competent for that purpose. It

further appeared that he operated a boat which was later destroyed by fire, and it is claimed that this boat was employed for the purpose of transporting liquor to the shore, but this likewise appears only from statements of one or other of the conspirators. The boat to which we have referred was searched on two different occasions by the officers of the coast guard, while operated by Williams, but no intoxicating liquor was found. At the time of his arrest Williams was in company with one Rasmussen, an alleged conspirator who died before the trial. Rasmussen had on his person at the time of his arrest a receipt given for a part payment on the purchase price of the boat which brought the liquor into the United States, as charged in the third count of the indictment, and no explanation of such possession was offered. At the time of his arrest, Williams gave a fictitious name, and removed the coat he was wearing, replacing it with another. The coat thus removed was offered in evidence, and corresponds in texture with a pair of pants found in the boat which had been abandoned while attempting to introduce intoxicating liquor into the United States, as already stated. It will thus be seen that the only competent testimony tending to connect the appellant Williams with the commission of the offense was the company he was found in, the giving of an assumed name at the time of his arrest, and the unexplained possession of a coat comparing in texture with a pair of pants found in an abandoned boat.

From this it clearly appears that the defendant Williams was in no way connected with the alleged conspiracy, and that in the judgment of the court the facts were legally insufficient to support the verdict of guilty.

Counsel for appellants likewise cite several other Federal cases, all of which are referred to in the last case of *United States v. Sugarman* which is quoted above, and in all of these cases a distinction is made between insufficiency of the evidence and legal insufficiency of the evidence. We respectfully submit that in this case there was evidence submitted which justified the verdict of the jury, and that the same should not be disturbed.

VIII.

No Misconduct Was Committed by the United States Attorney in His Argument to the Jury.

Counsel, in urging the eighth assignment of error, predicates the same upon alleged misquotations of the testimony on the part of counsel for the Government. That such was not the fact is borne out by the statement of the presiding judge, that no attempt was made on the part of counsel for the Government to misquote the testimony, and took occasion to criticize counsel for appellants for their continued interruptions of the closing argument of counsel for the Government.

In the case of *Latham v. United States,* 226 Federal 420, it appeared that counsel for the Government made the statement to the jury that had the train not been three hours late, he would have had another witness who would have testified that he also had been defrauded. It is very clear that this was a statement not justified under the evidence introduced in court nor proper deductions to be drawn. Therefore, the court very properly held that such statement was a misstatement of the evidence, and could in no way be part of the closing argument of counsel. It is quite apparent that such a state-

ment on the part of counsel for Government in any case would be prejudicial to the rights of defendants on trial.

It would appear to us that were it a fact that counsel for Government had conducted himself as counsel for appellants would like to have it appear, that such conduct would have been subject to a prompt rebuke on the part of the court, but such was not the case in the case under consideration. On the contrary, the court stated in open court that the interruptions made were uncalled for, and that no statement was made by counsel not borne out by the evidence, and in this case there is no showing made that any of the testimony alleged to have been misquoted by counsel for the Government was of such character as could not have been remedied by proper instructions, if the facts warranted the same.

Counsel for Government regrets that it became necessary for him to make certain statements concerning one of the counsel for the defendants, but respectfully submits that any intemperance of speech on the part of the prosecuting attorney to constitute error must be shown to have prejudiced the defendants. Such a showing was not made, and we are of the opinion that the remarks addressed by counsel for the Government to counsel for the appellants were fully justified in view of the very apparent purpose for which the uncalled for interruptions were made.

Here again counsel takes exception to conduct of the learned judge in reprimanding counsel for appellants for their conduct during the time that counsel for Government was arguing the case. We respectfully submit that a reading of the evidence submitted to this court will show that counsel for appellants were so conducting themselves which fully justified the mild reprimand which they received.

IX.

The Court Did Not Misdirect the Jury.

Appellants contend that the court misdirected the jury and virtually instructed that, as a matter of law, appellants were guilty of the offenses charged, thereby invading the province of the jury. We concede that any instruction so invading the province of the jury, unlimited and unqualified, will constitute error. In the instant case, however, the court was very careful to advise the jury that they were the sole judges of the facts, and that they should not permit their province as sole judges of the facts to be invaded, and that they should disregard any impression as to the court's view of the merits of the case. This instruction was set forth on pages 240 and 241 of the transcript, as follows:

> "We may speak of the facts by way of illustration of a point of law which we feel necessitated to make. We may speak of the facts by way of illustrating what powers of consideration and what range of considerations should be entered into to weigh facts. Just as we have said, the government's testimony is, in the main, undisputed, but whatever we may do or have already done which may give to any one of you some sort of impression as to how this court considers the merits of this case, it is very necessary that you should not permit yourselves, as the sole judges of the facts, to be weighed by any such thought or influence of impression, but be jealous that you should be unaided by the court, except as the court advises you as to the law and incidentally discusses the facts and that your province is not invaded as the sole judges of the facts. You are the sole judges of the credibility

of witnesses. Now, credibility is an incident of a trial which is affected by testimony and evidence, and when we discuss your privileges as the sole judges of the credibility of witnesses, we may say something about facts that bear upon that subject and can, except as the court aids you by whatever we may say on those subjects, to fully consider this case in all its bearings and you should not permit yourselves to be influenced by what you consider the court's opinion as to the credibility of any witness, but exercise your function unaided by any such impression, as the sole judges of that credibility."

It should also be noticed in this case that the first instruction quoted by appellants under Point IX on pages 77 and 78, was not accepted.

Appellants also contend that the court misdirected the jury with respect to the pipe line from the Quirin mine. (Argument, page 81.) This instruction dealt only with appellant Quirin. The court was again careful to advise the jury in connection with this instruction. Any conclusion the court might have reached should not be the conclusion of the jury, as it was the jury's business and not the court's. [Tr. p. 255.]

The court, immediately thereafter, again advised the jury that they were the sole, exclusive judges of the facts in the following language:

"The Court: Now, gentlemen of the jury, again we remind you that you are the sole judges of the facts of the case and that you are to exercise this function unaided by any impressions you may have respecting the court's opinion as to the guilt or innocence of any of these defendants. You must not

permit yourselves to be aided in your cogitations, on this case, by what you think the court thinks about it. You are the sole judges of the credibility of these witnesses, and we remind you of what was said in the beginning about the office of reasonable doubt. In a conspiracy case, as in other criminal cases, the several accused here are presumed to be innocent until the contrary is shown by proof. Whether that proof is in whole or in part circumstantial, the circumstances relied upon by the prosecution must so indicate the guilt of the accused as to leave no reasonable explanation of them which is consistent with the accused's innocence."

We respectfully contend that the court's instructions, taken as a whole, correctly set forth the law, and no error was committed by the court in giving the instructions complained of.

For the foregoing reasons, it is respectfully submitted that the judgment appealed from be affirmed.

Respectfully submitted,

SAMUEL W. MCNABB,
United States Attorney.

J. GEO. OHANNESIAN,
and
WILLIAM R. GALLAGHER,
Assistant United States Attorneys.

No. 6125

United States

Circuit Court of Appeals

For the Ninth Circuit.

C. I. T. CORPORATION, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page.

In the District Court of the United States, in and for the Northern District of California.

No. 494—ADMIRALTY.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE GRAHAM TRUCK, Engine Number D105-400B, License Number 162162, Its Tools and Appurtenances,

Respondent.

C. I. T. CORPORATION,

Claimant.

STATEMENT OF CLERK, DISTRICT COURT.

PARTIES.

Libelant: United States of America.

Respondent: One Graham Truck, Engine Number D105400B, License Number 162162, Its Tools and Appurtenances.

Claimant: C. I. T. Corporation.

PROCTORS.

Libelant: GEORGE J. HATFIELD, Esq., United States Attorney.

Respondent and Claimant: HINSDALE, OTIS & JOHNSON, Esqs. [1*]

*Page-number appearing at the foot of page of original certified Transcript of Record.

1928.

Apr. 13. Filed libel for forfeiture of truck.

Issued monition for attachment of said truck, which said monition was afterwards on the 20th day of April, 1928, returned and filed with the following return of the United States Marshal endorsed thereon:

"In obedience to the within monition, I attached the Graham Truck therein described, on the 18th day of April, 1928, and have given due notice to all persons claiming the same that this court will, on the —— day of —— (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same.

FRED L. ESOLA,
U. S. Marshal.
By W. M. AHERN,
Deputy Marshal.

Dated April 18, 1928."

May 14. Proclamation made; ordered default entered.

June 13. Ordered default vacated; claimant to have 30 days in which to plead.

1929.

Mar. 1. Filed demurrer and answer of C. I. T. Corporation.

Mar. 11. The demurrer to the libel was heard on this day in the District Court of the United States in *the* for the Northern District of California, at the City of Sacramento, before the Honorable George M. Bourquin, District Judge for the District of Montana, designated to hold and holding said court, at which time the demurrer to the libel was overruled. [2]

Nov. 15. The trial of this cause was heard this day before the Honorable A. F. St. Sure, District Judge, and after argument it was ordered that the cause be submitted on briefs to be filed.

1930.

Jan. 22. Briefs having been filed and the cause being fully considered it was ordered that judgment be entered for libelant as prayed for in the libel.

Jan. 30. Filed stipulation waiving jury trial.
Lodged findings requested by claimant.

Feb. 3. Filed request for findings.

Feb. 14. Filed order of forfeiture and sale.

Feb. 24. Filed proposed bill of exceptions.

Feb. 28. Filed *nunc pro tunc* as of Feb. 14, 1930, order denying request for special findings.

Mar. 24. Filed proposed amendments to proposed bill of exceptions.

Apr. 2. Filed stipulation *re* bill of exceptions.

Apr. 4. Filed bill of exceptions.
Apr. 5. Filed petition for appeal. Filed assignment of errors.
Apr. 8. Filed order allowing appeal. Filed citation on appeal.
Filed praecipe for transcript on appeal. Filed stipulation *re* preparation of record.
Apr. 9. Filed undertaking on appeal. [3]

In the Northern Division of the United States District Court for the Northern District of California, First Division.

No. ——.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE GRAHAM TRUCK, Engine Number D105-400B, License Number 162162, Its Tools and Appurtenances,

Respondent.

LIBEL OF INFORMATION.

The United States of America, by GEORGE J. HATFIELD, United States Attorney for the Northern District of California, respectfully shows:

I.

That on or about the 17th day of March, 1928, in

the County of Yolo, State of California, and within the jurisdiction of the United States and this Honorable Court, Joseph R. Sheean, duly appointed and acting agent of the Bureau of Prohibition of the United States, seized a certain automobile, to wit: ONE GRAHAM TRUCK, Engine Number D105400B, License Number 162162, its tools and appurtenances, which was then and there found in the yard and enclosure of the premises known as the McGregory Ranch, four miles south of Westgate, Yolo County, California, in which said yard and enclosure there was also found the following articles and raw materials, to wit:

1–350-gallon alcohol still complete—10,000 gallons mash.

150 gallons jackass brandy—36 sacks corn sugar.

II.

That the said articles and raw materials were designed and possessed for the purpose and with the intent to manufacture intoxicating liquors of a kind subject to tax, and upon which there was then and there due and imposed certain taxes to the United States of America. [4]

III.

That the said taxes due and imposed as aforesaid had not been paid, and the said articles and raw materials were possessed and concealed in said yard and enclosure with intent to defraud the United States of the said taxes.

IV.

That the said possession and concealment of the said articles and raw materials was and is a violation of the provisions of Section 3450 of the Revised Statutes of the United States, and the said automobile, its tools and appurtenances are subject to condemnation, forfeiture, and sale.

WHEREFORE the United States Attorney prays that the usual process issue against the said automobile, its tools and appurtenances, and that all persons interested in and concerned with the said automobile, its tools and appurtenances, be cited to appear and show cause why such forfeiture should not be adjudged, and that all due proceedings being had therein, this Honorable Court may be pleased to condemn the said automobile, its tools and appurtenances, as forfeited to the United States, and that a judgment condemning the same may thereupon be entered, and that the said judgment may also order the United States Marshal to sell the said automobile, its tools and appurtenances, as provided by law; and for such other and further judgment and order as to the Court may seem proper in the premises.

Dated: April 11th, 1928.

GEO. J. HATFIELD,
United States Attorney.

Filed Apr. 13, 1928. [5]

[Same Court—Same Cause.]

DEMURRER AND ANSWER OF C. I. T. CORPORATION.

DEMURRER.

Comes now the C. I. T. Corporation, a corporation, claimant of the Graham Truck, its tools and appurtenances, mentioned in the libel heretofore filed herein, and demurs to the said libel, and for ground of demurrer alleges that said libel does not state facts sufficient to constitute a cause of action or cause of forfeiture.

ANSWER.

Not waiving said demurrer, but at all times insisting thereon, for answer claimant alleges:

1.

That said claimant is, and was at all times hereinafter mentioned, a corporation, organized, existing and doing business under and by virtue of the laws of Delaware and doing business and duly authorized to do business in the State of California, and having its principal place of business at San Francisco, in said state.

2.

That this claimant has no knowledge or information sufficient to enable it to answer any one or more of the following allegations contained in said libel, and

placing its denial on that ground, it denies said allegations and each of them.

The allegations so denied are the following and each of them, to wit:

(a) Each and every, all and singular the allegations of Paragraph I of said libel.

(b) Each and every, all and singular the allegations of Paragraph II of said libel. [6]

(c) Each and every, all and singular the allegations of Paragraph III of said libel.

(d) Each and every, all and singular the allegations of Paragraph IV of said libel.

And further answering the allegations in said libel contained this claimant alleges as follows:

1.

That the allegations contained in Paragraph 1 of the foregoing answer are hereby repeated, adopted and made a part hereof.

2.

That said claimant is the owner of said Graham Truck, its tools and appurtenances, and entitled to the immediate possession thereof, and was the owner thereof at the time same were seized by the United States.

3.

That if at the time of the seizure of said truck, its tools and appurtenances aforesaid, or at any other time there was in said property or any part thereof, any of the articles or raw materials mentioned in the said libel, said articles and/or raw

materials had been there placed without the connivance, consent or knowledge of claimant.

WHEREFORE, having fully answered this claimant prays that it may be adjudged to be the owner and entitled to the immediate possession of said truck, tools and appurtenances, and that this libel be dismissed and said property ordered to be returned to him, and for other and further relief.

HINSDALE, OTIS & JOHNSON,
Attorneys for Claimant.

State of California,
County of Sacramento,—ss.

Gerald R. Johnson, being first duly sworn, deposes and says that he is a member of the firm of Hinsdale, Otis & Johnson, and is one of the attorneys for claimant in the above-entitled action; [7] that he has read the above and foregoing answer and that the same is true of his own knowledge except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true. That the said claimant is absent from the county where the attorneys for said claimant have their office; that the attorneys for said claimant have their office in the City of Sacramento, County of Sacramento, State of California. That he makes this verification for the reason that said claimant is absent from the County of Sacramento.

GERALD R. JOHNSON.

Subscribed and sworn to before me this 28 day of February, 1929.

[Seal] LILLIAN SOTO,
Notary Public in and for the County of Sacramento, State of California.

Service of the within demurrer, etc., by copy admitted this 1st day of March, 1929.

ALBERT E. SHEETS,
Attorney for Pltff.

Filed Mar. 1, 1929. [8]

[Same Court—Same Cause.]

ORDER OF FORFEITURE AND SALE.

This cause having come on regularly for trial on the 15th day of November, 1929, and due proceedings had thereon,—

IT IS HEREBY ORDERED that the said truck, to wit: ONE GRAHAM TRUCK, Engine No. D105400B, License No. 162162, its tools and appurtenances, be forfeited to the United States of America, libelant herein, and sold at public auction by the United States Marshal for the Northern District of California, at the United States Postoffice Building, 7th and Stevenson Streets, City and County of San Francisco; and

IT IS FURTHER ORDERED that the United States Marshal from the proceeds of the sale of said automobile shall pay all storage charges and expenses incident to the seizure and sale, and shall

deposit the net proceeds with the Clerk of the above-entitled court to be by him covered into the Treasury of the United States, according to law.

Dated: February 14, 1930.

A. F. ST. SURE,
United States District Judge.

Filed Feb. 14, 1930. [9]

[Same Court—Same Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that this cause came on for trial on the libel and the claim and answer of C. I. T. Corporation on November 14, 1929, before the Court sitting without a jury—trial by jury having been expressly waived in writing by the parties hereto, which said waiver was duly filed with the Clerk hereof. Plaintiff appeared by Hon. Albert A. Sheets, Assistant United States Attorney and claimant C. I. T. Corporation by its attorneys, Messrs. Hinsdale, Otis and Johnson; all parties announced ready for trial, whereupon proceedings were had and evidence heard as follows:

Joseph R. Sheean, having been called and sworn as a witness on behalf of the United States, said claimant objected to the introduction of any testimony herein, on the ground that the libel does not state facts sufficient to constitute a cause of action. Said objection was overruled and said claimant duly excepted and it was announced by the Court that "it is understood that the objection of counsel hereto-

(Testimony of Joseph R. Sheean.)

fore made goes to all the testimony of this witness" —whereupon said JOSEPH R. SHEEAN testified as follows:

TESTIMONY OF JOSEPH R. SHEEAN, FOR THE GOVERNMENT.

"I am, and on March 17, 1928, was a Federal Prohibition Officer. On that date I had occasion to visit premises in Yolo County on [10] which was located a still. At the Miagregoria ranch, four miles south of Westgate, in Yolo County, I found a 150-gallon alcohol plant complete, with 1000 gallons of mash complete and 150 gallons of jackass brandy, and such other supplies for a still. The still was enclosed within a large barn. Found the truck in the premises outside of the barn—about 50 yards. Around the barnyard was a one by six board fence. They had opened the gate and they started in the enclosure—the agents started to apprehend, but one got away and he apprehended the other—the front wheels (of the truck) were in the yard and the hind wheels just going across the line and when the agents came out of the barn the men attempted to get away and one did get away.

On the truck was some Argo sugar—that is used for the distillation of spirits—I found similar sugar at the still. It is my belief that no tax had been paid.

Cross-examination.

The truck was not moving when I first saw it. I

(Testimony of Joseph R. Sheean.)

was on the premises—it came on the premises afterwards. We waited for it, on information from one of the men in the still-room that the truck would arrive around midnight. The truck was partly in the enclosure when they tried to get away. The gate had been opened—I wasn't at the gate. I would say the truck was just about on the line—it was part over the line, and the rear part outside of this particular enclosure. The gate had been opened and they were proceeding in.

Redirect.

I found attendants on the place—Frank Poncini and Segundo Romini.

Recross.

Frank Poncini, Segundo Romini, Jim Gustalli and Pete Spinoglio were there and they were afterwards prosecuted in the State [11] courts and each was fined One Thousand Dollars."

And plaintiff rested.

Whereupon the following proceedings were had, viz.: It was stipulated that:

"The automobile in question in this libel was at the time of its seizure and now is owned by the claimant here, C. I. T. Corporation, but had been by said owner delivered into the possession of one Louis Belli under and according to the terms of a conditional bill of sale wherein said C. I. T. Corporation has the title so reserved to claimant until the purchase price of $1628 should have been fully paid.

Such purchase price has not been fully paid, in whole or at any time since the seizure herein, and the amount now due and unpaid thereon is the sum of $825. And that

"The C. I. T. Corporation claimant in this suit did not have any knowledge as to the purpose for which this truck was being used or put," and that if the president of the claimant corporation were present he would testify,—

"That before the purchase of said contract claimant herein investigated the standing of the said L. Belli as to his financial ability to carry out the terms of said aforementioned contract and as to whether or not the said L. Belli was a good moral risk. This investigation was conducted partly by claimant and partly by Messrs. Hooper and Holmes, an investigating agency of San Francisco, California. Inquiry was made of the Sacramento banks as to the financial status of the said L. Belli and the reports therefrom were satisfactory. It was ascertained that the said L. Belli had purchased other automotive equipment and had satisfactorily completed his contracts for the purchase thereof. Inquiries were made from neighbors living in close proximity to the said L. Belli and the reports emanating therefrom were good. [12] After said investigations and reports were obtained claimant herein determined that the said L. Belli was a good moral and financial risk."

And claimant rested; and no evidence was introduced or offered in rebuttal.

Whereupon the cause was duly submitted and on,

to wit: the 3d day of February, 1930, said claimant made and filed its request for findings as follows:

"(I) The claimant C. I. T. Corporation hereby requests the Court to make findings of fact and conclusions of law herein.

(II) Libellant having failed to serve or file any findings or conclusions within the time prescribed by the rules of this court, or at all, said claimant hereby serves and files the following, and requests the Court to make them and each of them as findings of fact and conclusions of law herein, to wit:

REQUESTED FINDINGS OF FACT.

This cause came on to be heard the 14th day of November, 1929, by and before the Court sitting without a jury—a trial by jury having been expressly waived by written stipulation of the parties duly made and filed with the Clerk herein, on the libel and the intervening claim of C. I. T. Corporation duly filed herein. Libelant appeared by its attorney, Hon. Albert E. Sheets, Assistant United States Attorney, and said claimant C. I. T. Corporation by its attorneys, Messrs. Hinsdale, Otis & Johnson; both of said parties having announced ready for trial, evidence and argument was duly heard and the cause duly submitted and taken under advisement. The Court finds from the evidence the facts to be as follows, to wit:

I.

That all the allegations of Paragraph I of the libel herein are, and each of them is, true. [13]

II.

That the allegations of Paragraph II of the said libel are, and each of them is, untrue.

III.

That the allegations of Paragraph III of said libel are, and each of them is, untrue.

IV.

That the allegations of Paragraph V of said libel are, and each of them is, untrue.

V.

That the Graham Paige Truck mentioned in the libel was not wholly within the yard or enclosure in which were found the still, brandy and raw materials mentioned in said libel; but that said still, brandy and raw materials were found in a barn and said truck was found about 50 yards from said barn and partly within and partly without the yard enclosing said barn—the front wheels of said truck being within, and the rear wheels of said truck being without, said enclosure.

VI.

That said Graham Paige Truck was not used in or appertained to or had any connection with the still, brandy and/or raw materials mentioned in the libel.

VII.

That the still, brandy and raw materials mentioned in the libel were not possessed or concealed with intent to defraud the United States of any taxes.

VIII.

That said Graham Paige Truck is now, and at the time of its seizure was, owned by claimant, C. I. T. Corporation, and that said C. I. T. Corporation did not know or suspect and had no reason to know or suspect that said truck was being, or would be, used in the [14] accomplishment of any unlawful purpose or design or intent and was not guilty of any negligence in this regard.

IX.

That Joseph R. Wheean, the person who seized the Graham Paige Truck mentioned in the libel herein, was not a Collector or Deputy Collector of Internal Revenue nor was he a person who had been authorized by any Commissioner of Internal Revenue or by any Collector or Deputy Collector to make seizures.

And as flowing from the above findings of fact the Court makes the following

CONCLUSIONS OF LAW.

That the said Graham Paige Truck has not incurred forfeiture and that said claimant is entitled to a decree and judgment of this Court dismissing the libel herein and ordering said Truck to be returned to it.

Dated: February ——, 1930."

But the Court declined to make any of the findings requested and also declined to make any findings whatsoever in the case.

To which action of the Court claimant excepted as to each and every of said refusals, *seriatim.*

And thereafter the Court made and entered judgment in favor of plaintiff as prayed for to which said claimant duly excepted.

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

I, A. F. St. Sure, Judge of the above-entitled court, being the judge by and before whom the above-entitled cause was tried and determined, do hereby certify that the above and foregoing contains the evidence and all the evidence introduced or offered at the trial hereof and is a full, true and correct account of all the proceedings, rulings and exceptions had and/or taken herein. I further certify that said bill of exceptions was settled and filed herein [15] within the term at which said cause was tried and within the time and in the manner prescribed by law and the rules of this court; and I do further certify that same is a true and correct bill of exceptions herein and I do settle same as such and order it to be filed and to become a part of the record herein.

Dated: This 3d day of April, 1930.

A. F. St. SURE,
Judge.

Filed Apr. 4, 1930. [16]

[Same Court—Same Cause.]

PETITION FOR APPEAL.

To the Hon. A. F. St. SURE, Judge of the Above-entitled Court:

C. I. T. Corporation, above-named claimant, being aggrieved by the final judgment made and entered herein on February 14, 1930, prays that an appeal may be allowed from said judgment to the United States Circuit Court of Appeal for the Ninth Circuit, and, in connection therewith said petitioner herewith and hereby presents its assignment of errors.

Dated: This 5th day of April, 1930.

C. I. T. CORPORATION,
Claimant.

By HINSDALE, OTIS and JOHNSON,
Attorneys for Claimant.

Filed Apr. 5, 1930. [17]

[Same Court—Same Cause.]

ASSIGNMENT OF ERRORS.

Comes now C. I. T. Corporation, above-named claimant, and files and presents this its assignment of errors on its petition for appeal herewith filed herein, to wit:

I.

The Court erred in overruling the demurrer filed

herein and in holding that the libel herein stated facts sufficient to constitute a cause of action or forfeiture.

II.

The Court erred in overruling claimant's objection made at the commencement of the trial hereof to the introduction of any testimony herein—which said objection was on the ground then stated by claimant that the libel herein did not state facts sufficient to constitute a cause of action or forfeiture.

III.

The Court erred in denying claimant's request that the Court make findings of fact herein.

IV.

The Court erred in refusing to make Finding of Fact No. V requested by claimant; which said requested finding and conclusion of law was as follows:

> "That the Graham Paige Truck mentioned in the libel was not wholly within the yard or enclosure in which were found the still, brandy and raw materials mentioned in said libel; but that said still, brandy and raw materials were found in a barn and said truck was found about 50 yards from said barn and partly within and *party* without the yard enclosing said barn—the front wheels of said truck being within, and the rear wheels of said truck being without, said enclosure." [18]

V.

The Court erred in refusing to make Finding of Fact No. VI requested by claimant; which said requested finding and conclusion of law was as follows:

> "That said Graham Paige Truck was not used in or appertained to or had any connection with the still, brandy and/or raw materials mentioned in the libel."

VI.

The Court erred in refusing to make Finding of Fact No. VII requested by claimant; which said requested finding and conclusion of law was as follows:

> "That the still, brandy and raw materials mentioned in the libel were not possessed or concealed with intent to defraud the United States of any taxes."

VII.

The Court erred in refusing to make Finding of Fact No. VIII requested by claimant; which said requested finding and conclusion of law was as follows:

> "That said Graham Paige Truck is now, and at the time of its seizure was, owned by claimant, C. I. T. Corporation, and that said C. I. T. Corporation did not know or suspect and had no reason to know or suspect that said truck was being, or would be, used in the accomplishment of any unlawful purpose or design or

intent and was not guilty of any negligence in this regard."

VIII.

The Court erred in refusing to make Finding of Fact No. IX requested by claimant; which said requested finding and conclusion of law was as follows:

"That Joseph R. Sheean, the person who seized the Graham Paige Truck mentioned in the libel herein was not a Collector or Deputy Collector of Internal Revenue nor was he a person who had been authorized by any Commissioner of Internal Revenue or by any Collector or Deputy Collector to make seizures." [19]

IX.

The Court erred in refusing to make conclusion of law as requested by claimant—which said requested conclusion was as follows:

"That the said Graham Paige Truck has not incurred forfeiture and that said claimant is entitled to a decree and judgment of this court dismissing the libel herein and ordering said truck to be returned to it."

X.

The Court erred in rendering final judgment herein without having made findings of fact herein.

XI.

The Court erred in rendering final judgment in favor of libellant; said judgment is contrary to the

evidence and contrary to law in that the libel and also the uncontradicted evidence showed that the person who seized the truck, to wit, Joseph R. Sheean, was not a Collector or Deputy Collector of Internal Revenue nor a person specially authorized by the Commissioner of Internal Revenue, and also in that there was no evidence that the still, brandy and/or raw materials mentioned in the libel were possessed or concealed with any intent to defraud the United States of taxes, or otherwise, and in that there was no evidence that the seized truck was in the yard or enclosure where were found the still and/or the brandy and/or raw materials mentioned in the libel.

XII.

The Court erred in not rendering judgment herein dismissing said libel, and in favor of claimant herein, in that under the pleadings and the evidence adduced at the trial it was shown that the person who seized the truck, to wit, Joseph R. Sheean, was not a collector or deputy collector and was not a person specially authorized by the Commissioner of Internal Revenue, and also in that there was no evidence that the still, brandy or raw materials mentioned [20] in the libel was possessed or concealed with any intent to defraud the United States of taxes or otherwise, and in that there was no evidence that the seized truck was found in the yard or enclosure in which were found the said still, brandy or other *war* materials.

WHEREFORE, claimant prays that the judgment herein be reversed and that the above-entitled

court be ordered to enter a judgment herein for the dismissal of said libel and in favor of claimant.

Dated: This 5th day of April, 1930.

HINSDALE, OTIS and JOHNSON,
Attorneys for Claimant, C. I. T. Corporation.

Filed Apr. 5, 1930. [21]

[Same Court—Same Cause.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF COST BOND.

C. I. T. Corporation, above-named claimant, having filed and presented its petition for appeal herein and therewith its assignment of errors and the Court having considered same,—

ORDERED that the appeal prayed for in said petition for appeal be and the same is hereby allowed and that due citation on appeal issue herein; also

FURTHER ORDERED that the amount of the bond for costs on appeal be and the same is hereby fixed at $250.00.

Dated: This 7 day of April, 1930.

A. F. St. SURE,
Judge.

Filed Apr. 8, 1930. [22]

[Same Court—Same Cause.]

UNDERTAKING ON APPEAL—COSTS ONLY.

WHEREAS, the C. I. T. Corporation, a corporation, claimant in the above-entitled action, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment entered February 14th, 1930, in said action in favor of the libellant for the forfeiture of the Graham Truck claimed by said C. I. T. Corporation, claimant in said action,—

NOW, THEREFORE, in consideration of the premises and of such appeal, the undersigned Maryland Casualty Company, a corporation organized and existing under the laws of the State of Maryland and duly authorized to transact a general surety business in the State of California, does hereby undertake and promise on the part of the appellant that said appellant will pay all damages and costs which may be awarded against it on the appeal, or on a dismissal thereof, not exceeding Three Hundred Dollars, to which amount it acknowledges itself bound.

This recognizance shall be deemed and construed to contain the "express agreement" for summary judgment, and execution thereon, mentioned in Rule No. 34 of the District Court.

IN WITNESS WHEREOF, the said surety has caused its corporate name and seal to be affixed by

its duly authorized officer at San Francisco, California, the 7th day of April, A. D. 1930.

MARYLAND CASUALTY COMPANY,
By W. G. KELSO,
Attorney-in-fact.

State of California,
City and County of San Francisco,—ss.

On the 7th day of April, in the year one thousand nine hundred and thirty, before me, Con T. Shea, a notary public in and for the City and County of San Francisco, personally appeared W. G. Kelso, [23] known to me to be the attorney-in-fact of the Maryland Casualty Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year in this certificate first above written.

[Seal] CON T. SHEA,
Notary Public in and for the City and County of San Francisco, State of California.

Filed Apr. 9, 1930. [24]

[Same Court—Same Cause.]

STIPULATION RE PREPARATION AND PRINTING OF RECORD.

STIPULATED AND AGREED:

1. That in the transcript of the record to be prepared by the Clerk the paper first appearing shall be a copy of the libel and that the title of the court and cause shall be omitted from the copies of the subsequent papers and orders—the Clerk substituting in lieu thereof the words, "Same Court —Same Cause."

2. That all endorsements and all full file markings shall be omitted—it being sufficient to say: Filed, together with a notation of the date when filed.

3. That the title of the case in the Circuit Court of Appeals may and shall be:

"C. I. T. Corporation, a Corporation, Claimant of One Graham Truck, Its Tools and Appurtenances,

Appellant,

vs.

The United States of America,

Appellee."

and that the printer shall so entitle*d* the case on the cover of the printed record.

Dated: April 8th, 1930.

GEO. J. HATFIELD,
United States Attorney,
By ALBERT E. SHEETS,
Assistant United States Attorney,
Attorneys for Libellant-Appellee, United States.

HINSDALE, OTIS & JOHNSON,
Attorneys for Claimant-Appellant.

Filed Apr. 8, 1930. [25]

[Same Court—Same Cause.]

PRAECIPE FOR TRANSCRIPT ON APPEAL.

To the Clerk of the Above-entitled Court:

Please prepare transcript for appeal—embodying in said transcript copies of the following, viz.:

1. The libel.
2. The demurrer, claim and answer.
3. The judgment.
4. The bill of exceptions as signed.
5. The petition for order allowing appeal.
6. The assignment of errors.
7. Order allowing appeal.
8. Citation on appeal—(Original).
9. Bond for costs of appeal.
10. This praecipe.
11. Stipulation *re* transcript—filed April 8, 1930.

Dated: April ——, 1930.

HINSDALE, OTIS & JOHNSON,
Attorneys for Claimant-Appellant.

Filed Apr. 8, 1930. [26]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 26 pages, numbered from 1 to 26, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of United States vs. One Graham Truck, etc., No. 494—Adm., as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal, copy of which is embodied herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Eleven and 50/100 ($11.50) Dollars, and that the same has been paid to me by the attorneys for the claimant herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, this 15th day of April, A. D. 1930.

[Seal] WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [27]

[Same Court—Same Cause.]

CITATION ON APPEAL.

The President of the United States, to the United States of America and to GEO. J. HATFIELD, United States Attorney, and to ALBERT E. SHEETS, Assistant United States Attorney, Attorneys for Above-named Libellant:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, on or before thirty days from date hereof, pursuant to order allowing appeal to said court filed in the Clerk's office of the Northern Division of the United States District Court for the Northern District of California at Sacramento, California, in that certain cause wherein you are libellant and C. I. T. Corporation is claimant; then and there to show cause if any there be why the final judgment of the last above named court made and entered in the above-entitled cause on the 14th day of February, 1930, should not be corrected and reversed and why speedy justice should not be had in the premises.

Dated: This 7 day of April, 1930.

A. F. ST. SURE,
United States District Judge.

Copy received and service accepted this 8th day of April, 1930.

GEO. J. HATFIELD,
United States Attorney,
By ALBERT E. SHEETS,
Assistant United States Attorney,
Attorneys for Libellant-Defendant in Error. [28]

Filed Apr. 8, 1930. [29]

[Endorsed]: No. 6125. United States Circuit Court of Appeals for the Ninth Circuit. C. I. T. Corporation, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed April 16, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6125

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

C. I. T. CORPORATION, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

HINSDALE, OTIS AND JOHNSON,
Sacramento, California,
Attorneys for Appellant.

ROBERT W. JENNINGS,
San Francisco, Calif.
Of Counsel.

Parker Printing Company, 545 Sansome Street, San Francisco

Subject Index

Authorities Cited or Discussed

No. 6125

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

C. I. T. CORPORATION, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

(NOTE: All italicizing is Appellant's. P. R. p....., indicates the page of the Printed Record.)

STATEMENT.

This is an appeal from a judgment forfeiting to the Government one certain Graham Truck, for being in a "yard or enclosure" in which said yard or enclosure (it is alleged) there was also found certain

named "contraband", which said "contraband" (it is alleged) was then and there possessed and concealed with intent *to defraud the revenue* by evading the payment of the tax.

Pleadings.

The Libel (P. R. p. 4) alleges that the truck was seized by one Joseph R. Sheean who is stated in said libel to have been

> "a duly appointed and acting *Agent of the Bureau of Prohibition of the U. S.",*

and that said truck was found by said Sheean

> "in the yard and enclosure of premises known as McGregory Ranch, four miles south of Westgate, Yolo County, California",

and that in said yard and enclosure there was also found

> "the following *articles and raw materials,* to-wit one 350 gallon alcohol still complete, 10,000 gallons of mash, 150 gallons of Jack Ass Brandy, 36 sacks of corn sugar",

and that said articles and raw materials were

> "designed and possessed for the purpose and with the intent to manufacture liquors of a kind subject to tax and upon which there was then and there due and imposed certain taxes to the U. S. of America",

and that

> "the said taxes had not been paid and the said *articles and raw materials* were possessed and

concealed in said yard and enclosure *with intent to defraud* the U. S. of said taxes",

and that said possession and concealment were

"in violation of *Section 3450, R. S. U. S.*".

Demurrer, Claim and Answer (P. R. p. 7).

The C. I. T. Corporation (appellant herein) appeared and filed herein (in one paper) its Demurrer, Claim and Answer. The *Demurrer* was on the ground that the libel did not state facts sufficient to constitute a cause of action or forfeiture: the *Answer* set forth ownership by said C. I. T. Corporation of the truck in question, and denied (for lack of information) the material allegations of the libel, and asserted the claimant's innocence of any wrong doing and/or inculpatory knowledge on its part. The Demurrer was overruled.

Trial.

The case came on to be tried on the Libel and Answer, before the court without a jury—jury trial having been duly waived.

At the commencement of the trial, claimant objected to the introduction of any evidence; on the ground that the Libel did not state a cause of action or forfeiture. This objection was overruled, and evidence was heard and the cause submitted. At a reasonable time before judgment, the claimant requested the court to make Findings of Fact and Conclusions of Law and also to make certain enumerated Special

Findings of Fact and Conclusions of Law; but the court refused all such requests and rendered *Judgment of Forfeiture, without having made any findings whatsoever.*

There was *no evidence* that Mr. Sheean (who made the seizure) was a "Collector or Deputy Collector", or was a person who had been "specially authorized by the Commissioner of Internal Revenue" to make seizures; *no evidence* that the "articles and raw materials" were possessed or concealed with any *intent to defraud the revenue; no evidence* that the truck was found within the "yard or enclosure"—the evidence on that point being that said truck was *partly within* and *partly without* the enclosure—(the front wheels being within and the rear wheels being without, the enclosure); *and the evidence showed* the C. I. T. Corporation to be the owner of the truck and that it had parted with its possession to one Louis Belli under a Conditional Bill of Sale and that they had no connivance in, or knowledge of, any (or of any contemplated) unlawful use or design; and *there was no evidence* that either C. I. T. Corporation or said Louis Belli had any connection whatsoever with any of the persons in whose immediate possession said truck or said articles or raw materials were found when seized by Mr. Sheean.

STATEMENT OF QUESTIONS INVOLVED IN THIS APPEAL AND OF THE MANNER IN WHICH SAID QUESTIONS WERE RAISED.

A statement of these matters appears in the headings of I, II, III, IV, V, VI of Points, Argument and Authorities, infra p. 5, et seq.

POINTS, ARGUMENT AND AUTHORITIES.

I and II

(considered together, because cognate).

(I) THE COURT ERRED IN OVERRULING THE DEMURRER.

The question arose on the demurrer (see Answer, P. R. p. 7) on the order overruling same (see Order-entry, P. R. p. 3) Assignment of Errors No. 1 (P. R. p. 19).

(II) THE COURT ERRED IN OVERRULING CLAIMANT'S OBJECTION TO THE INTRODUCTION OF EVIDENCE.

The question arose on the objection as made at the commencement of the trial (Bill of Exceptions, P. R. p. 11); on the ruling as made (Bill of Exceptions, P. R. p. 11), Assignment of Error No. II (P. R. p. 20).

Discussion.

(I) *The Demurrer:*

The Libel alleges in paragraphs II, III and IV:

"that the said articles and raw materials were designed and possessed with intent to manufacture

intoxicating liquors of a kind subject to tax and upon which there was then and there due and imposed certain taxes to the United States of America: that 'said taxes had not been paid, and the said articles and raw materials were possessed and concealed in said yard and inclosure with intent to defraud the United States of said taxes; that the said possession and concealment of the said articles and raw materials was *in violation of the provisions of section 3450 of the Revised Statutes of the United* and the said automobile, its tools and appurtenances are subject to condemnation, forfeiture and sale."

Said Section 3450, R. S. U. S., is Section 1181, Title 26, U. S. C. A.; and is as follows:

> "Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed * * * are removed or are deposited or concealed in any place with intent to defraud the U. S. of said tax or any part thereof, all such goods or commodities and all such materials, utensils and vessels, respectively, shall be forfeited; *and in every such case* * * * every vessel, boat, car, carriage or other conveyance whatsoever, and all horses or other animals *used in* the removal or the deposit or concealment thereof shall be forfeited."

The only allegation in the Libel which even hints at any "delinquency" on the part of the truck is the allegation in paragraph I (P. R. p. 4) that the truck was found

> "in the yard and enclosure of premises known as the McGregory Ranch four miles south of Westgate, Yolo County, California—in which said yard was also found the following articles and raw materials to-wit: one 350 gallon alcohol still—10,000 gallons mash—150 gallons jack ass brandy —36 sacks corn sugar."

It is manifest that the Libel does not state facts sufficient to authorize a forfeiture of the truck *under Section 3450, R. S. U. S.;* for the reason that there is no allegation of any connection whatsoever of the truck with the alleged contraband articles or with the alleged fraudulent intent—no allegation that the truck was used in the alleged deposit, removal or concealment—nothing except that the truck was found in the yard, or enclosure—(with not even an allegation of proximity). Claimant demurred on that ground: the demurrer was overruled; for the reason, we presume, that the court considered the Libel to be good under Section 3453, R. S. U. S., as that is the only section using the words "within the yard or enclosure".

Said Section 3453, R. S. U. S., is Section 1185, Title 26, U. S. C. A. and reads as follows, to-wit:

> "All goods, wares, merchandise, articles, or objects, on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal-revenue laws, or with design to avoid payment of said taxes, may be seized *by the collector or deputy collector of the proper district, or by such*

other collector or deputy collector as may be specially authorized by the Commissioner of Internal Revenue for that purpose, and shall be forfeited to the United States. And all raw materials found in the possession of any person intending to manufacture the same into articles of a kind subject to tax for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax; and all tools, implements, instruments, and personal property whatsoever, in the place or building, *or within any yard or inclosure where such articles or raw materials are found,* may also be seized *by any collector or deputy collector, as aforesaid,* and shall be forfeited as aforesaid. The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the district court of the United States for the district where such seizure is made."

This brings us to a consideration of

(II) *The Objection to the Introduction of Evidence:*

Granting, for the sake of the argument only, that the allegation in the Libel of a *violation of Section 3450, R. S. U. S.,* is mere surplusage and that it was right to overrule the Demurrer and the Objection, *provided* the Libel stated a cause of forfeiture under *any* Statute; still claimant maintains that the Libel is insufficient even under Section 3453, R. S. U. S.

Said Section 3453, R. S. U. S., is a very drastic statute—a very dangerous and oppressive statute; so much so that forfeitures on the ground only that the

seized object was found "within the yard or enclosure" where the "contraband" articles were found, have not often been adjudged by the courts.

Analyzing the section, as was done in *In re Hurley,* infra, it will be seen, we think, that the words "tools, implements, instruments and other personal property whatsoever in the place or building or within any yard or inclosure where such articles or raw materials are found may also be seized" have no reference whatsoever to the "finished product" (in the instant case, the 150 gallons of jack ass brandy) but only "to the places where the contraband article is *being fabricated"* (37 Fed. (2) p. 399—1st col. bottom). As early as 1867 it was held that:

> "The information should aver the fact that the tools, implements, and other personal property were found in the place or building or within the yard or enclosure *where they were intended to be used."*
>
> *U. S. v. Sixteen Hogsheads,* F. C. 16302; also F. C. 15948.

There is not in this Libel any allegation whatsoever that the seized truck was so found, or even that the raw materials were to be *there* manufactured into "contraband".

Construing the words "other personal property" as used in this statute Judge Lowell of the U. W. District Court of Mass. in *U. S. v. 33 Bbls.,* 23 F. C. 72, said:

> "* * * and upon a literal interpretation (the statute) might seem to subject to seizure and for-

feiture all goods and chattels and other things coming within the general description of personal property, to whomsoever they may belong if found in the same * * * yard, etc. with the offending goods. *It is impossible to believe* that any such sweeping condemnation is intended to be passed founded upon mere proximity in place upon the goods of all persons innocent or guilty—(2d Col. p. 73).

* * * * * * *

It is a rule of law as well as of natural justice that statutes will not be understood to forfeit property except for the fault of the owner or his agents general or special, unless such a construction is unavoidable (idem) citing

* * * * * * *

By reason and analogy, as well as by the context, we find that some real connection with the fraud is intended to be attached to the property that is liable to seizure. The taxed articles and the raw materials intended to be manufactured are the principal things, and the tools, implements, instruments and personal property are only the connected incidents. *I am of the opinion that by the familiar rule of construction, called noscitur a sociis, we must restrict the general words, personal property, by the more particular and immediately preceding words, tools, implements and instruments"* (idem. p. 73 bottom 2nd Col., top 1st Col. p. 74).

III.

THE COURT ERRED IN RENDERING JUDGMENT OF FORFEITURE WITHOUT HAVING MADE ANY FINDINGS OF FACT.

This question arose on Paragraph I of Request for Findings (see Bill of Exceptions, P. R. p. 15) Assignment of Errors No. X (P. R. p. 22).

Discussion.

A proceeding for forfeiture of property seized on land is a civil action at law to be tried as such.

Greer Robbins v. U. S., 19 Fed. (2d) 841; (9th C. C. A. 1927);

Nat. Surety Co. v. U. S., 17 Fed. (2) 372 (9th C. C. A. 1927).

In civil actions there must be a Finding of Facts—"either general or special to authorize a judgment and that finding must appear in the record".

Aetna v. Boon, 95 U. S. 117, 124 middle; 24 L. Ed. 395.

In the case at bar we have a judgment in a civil action at law (tried by the court) unsupported by *any* Finding of Fact—either general or special; and therefore it must be that the judgment cannot stand.

Claimant requested the court to make Findings and also requested the court to make certain enumerated special Findings of Fact and certain Conclusions of Law, and all of said Requests for Findings were refused by the court and said refusals were duly excepted to and duly assigned as error. This court,

then, will review the evidence (brought up by the Bill of Exceptions) for the purpose of determining its sufficiency.

Societe Nouvelle v. Barnaby, 246 Fed. 68, 71 (9th C. C. A. 1915).

The particulars wherein the evidence is thought to be insufficient are stated and discussed in IV, V and VI, infra—viz.:

IV.

THE COURT ERRED IN ADJUDGING A FORFEITURE OF THE TRUCK; BECAUSE THE EVIDENCE SHOWED THAT THE PERSON WHO MADE THE SEIZURE WAS NOT A "COLLECTOR OR DEPUTY COLLECTOR" OR ONE WHO HAD BEEN SPECIALLY AUTHORIZED BY THE COMMISSIONER OF INTERNAL REVENUE TO MAKE SEIZURE.

The question arose on the Libel and Demurrer and on the Evidence (Bill of Exceptions, Trp. p. 12), Request No. IX for Special Findings (Bill of Exceptions, P. R. p. 17), Assignment of Error No. VIII (P. R. p. 22).

Discussion.

At the beginning we wish to accentuate the fact that this is not a proceeding under the National Prohibition Act: on the contrary it is one under the Internal Revenue Act—Section 3453, R. S. U. S.

The Libel states, and the evidence shows, that the truck was not seized by any officer authorized to make a seizure under Section 3453 of the R. S. U. S. Sheean

is said to have been a Federal Prohibition Officer: it is not charged or shown that he was a "Collector" or "Deputy Collector" of "Internal Revenue" or "any person specially authorized by the Commissioner of Internal Revenue for that purpose"; and yet under said Section 3453 only such persons may make the seizure. We think this is manifest from an inspection of said Section 3453 and of preceding sections, viz.:

Section 3163, R. S. U. S. (Sec. 34, Title 26, U. S. C. A.), provides:

> "*Every collector* within his collection-district and *every internal revenue* agent shall see that all laws and regulations relating to the collection of internal taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto."

Section 3166, R. S. U. S. (Sec. 61, Title 26, U. S. C. A.), provides:

> "Any officer of internal revenue may be specially authorized by the Commissioner of Internal Revenue to seize any property, which may by law be subject to seizure, and for that purpose such officer shall have all the power conferred by law upon collectors; and *such special authority shall be limited in respect of time, place, and kind and class of property, as the Commissioner may specify;* Provided, That no collector shall be detailed or authorized to discharge any duty imposed by law upon any other collector."

Section 3453, R. S. U. S. (Sec. 1185, Title 26, U. S. C. A.), provides:

> "All goods, wares, merchandise, articles, or objects, on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal-revenue laws, or with design to avoid payment of said taxes, may be seized *by the collector or deputy collector* of the proper district, or by such other *collector or deputy collector as may be specially authorized by the Commissioner of Internal Revenue for that purpose,* and shall be forfeited to the United States. And all raw materials found in the possession of any person intending to manufacture the same into articles of a kind subject to tax for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax; and all tools, implements, instruments, *and personal property whatsoever,* in the place or building, *or within any yard or inclosure where such articles or raw materials are found,* may also be seized by any collector or deputy collector, as aforesaid, and shall be forfeited as aforesaid. The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the circuit court or district court of the United States for the district where such seizure is made."

It is thought that these sections of the Revenue Statutes clearly show that congress meant to limit to the officers named the "authority to seize" for simply being "in the yard or enclosure". It is conceded

that if this were a proceeding under the common law anybody's seizure would be good; if it were a proceeding under R. S. U. S., Section 3450, the seizure would be good; because in said section no officers are named to make the seizure. But it is not a proceeding under either the common law or under R. S. U. S., Section 3450: on the contrary, it is a proceeding under R. S. U. S., Section 3453—a far more drastic statute than Section 3450—(e. g., Section 3450 provides that all horses, carriages, etc. "*used* in the removal or for the deposit, etc., shall be forfeited"; *and* contains *no* mention of seizure and *contains no specification of the officer who is to make the seizure:* but Section 3453 goes further, by providing that "all tools, implements, instruments, and personal property whatsoever in the place or building, *or within any yard or enclosure where such articles or* raw materials are found *"may also be seized by any collector or deputy collector as aforesaid* and shall be forfeited as aforesaid").

Expressio unius, alterius exclusio; and especially so in a statute as drastic as Section 3453—a statute which on its face, seems to allow the forfeiture of the property of a person who may be entirely innocent of any wrong doing—property of which all that is said by the Libel or shown by the evidence here, is that it was "found within the yard or enclosure". By the fact of expressly naming in Section 3453 the officers who may make seizure under said section, it is to be inferred that no other officers or persons are so authorized—else why mention specific officers?

Why not "silence" on that subject? Section 3450 maintains silence on that subject; is there no significance in the fact that in the more drastic statute (viz.: Sec. 3453) that silence is broken?

In *United States v. Loomis,* 297 Fed. 360, the C. C. A. of the 9th Circuit said:

> "The general rule is that a statute whereby a man may be deprived of his personal property by way of a punishment should be construed with strictness; hence those who assume authority to take possession of such property should have clear warrant for their action." (Report p. 360.)

and

> "But in a direct proceeding, testing whether the automobile was liable to be seized by the police authorities, the lawfulness of the seizure will be inquired into. Forfeiture can only be declared if the thing sought to be forfeited was lawfully taken into possession."

This case was followed in *U. S. v. Certain Malt,* 23 Fed. (2) 879.

It will doubtless be contended that other decisions are to the effect that "anybody" can make a seizure, and that the government adopts the seizure by seeking enforcement of the forfeiture. We review (infra) the leading cases so holding, and show, we think, that they are not applicable to a proceeding under Section 3453, for the reason that said section specifically names the officers who may make seizures under that section, and such enumeration excludes all others.

In *U. S. v. One Reo Motor Truck,* 6 Fed. 2nd 412 (D. C. of R. I.), June, 1925, it is said—speaking of a seizure under a statute specifying the seizing officers but where the seizure was made by officers not specified—

> "In the absence of such provisions, it seems to me they are not included."

Review of Some Cases.

Hoyt v. Gelston, 3 Wheat 247; U. S. S. C., Feb., 1918.

This case is the fountain head, from which, in this country at least, are derived those authorities which hold that the seizure may be made by any one. The case involved the seizure of a ship then being fitted out and about to sail for the purpose of committing hostilities upon a foreign country with which the U. S. was at peace. The vessel was seized by the Collector of Customs at N. Y. Trespass was brought against the Collector and that official pleaded justification under the Statute and the President's orders. As to whether or not the Collector of Customs had authority to make the seizure the court said:

> "* * * *At common law,* any person may, at his peril, seize for a forfeiture, to the government; and if the government adopt his seizure, and the property is condemned, he will be completely justified. And it is not necessary, to sustain the seizure or justify the condemnation, that the party seizing shall be entitled to any part of the forfeiture, * * * And if the party be en-

> titled to any part of the forfeiture, * * * there can be no doubt, that he is entitled in that character to seize (Roberts v. Witherhead, 12 Mod. 92). *In the absence of all positive authority,* it might be proper to resort to these principles, in aid of the manifest purposes of the law. But there are express statuteable provisions, which directly apply to the present case."

and

> "* * * the case falls within the *broader language of the act of the 19th of February, 1793,* Ch. 8, s. 27, which authorizes the officers of the revenue to make seizure of any ship or goods, where any breach of the laws of the United States has been committed. Upon the general principle then, which has been above stated, and *upon the express enactment* of the statute, the defendants, supposing there to have been an actual forfeiture, might justify themselves in the seizure." (Report p. 259.)

From the above excerpts, it is apparent that the decision rests upon the statute and that whatever is said as to the common law is dicta: and whether that dicta be correct or incorrect as a statement of the common law, the decision can have no controlling weight here; because the validity of this seizure depends upon neither the common law nor upon a statute similar to the statute in that case. On the contrary said Section 3453 is radically different from any other.

The Caledonian, 4 Wheat. 100; U. S. S. C., Feb., 1819.

This case involved the right of a Collector of Customs to seize the enemy's ship as prize of war. The court merely said:

> "* * * any person may seize any property forfeited to the use of the government, either by the municipal law or the law of prize, for the purpose of enforcing the forfeiture. And it depends upon the government itself whether it will act upon the seizure. If it adopts the act of the party, and proceeds to enforce the forfeiture by legal process, this is a sufficient recognition and confirmation of the seizure and is of equal validity in law, with an original authority to the party to make the seizure." (Report p. 320.)

This is general language and must not be given application except in relation to the matter then before the court. There was not before the court any statute at all—least of all any statute at all similar to Section 3453, R. S. U. S. The court was simply administering the law of "prize".

Wood v. U. S., 16 Pet. 342; U. S. S. C., January, 1842.

This was a libel for forfeiture of certain imported goods which had not been invoiced at the place of exportation. It does not appear just what was the language of the violated Act (but see next

case infra), but the language of the court was this, to-wit:

> "*Under these Acts,* the enforcement of the forfeiture is not dependent upon the manner in which the goods may happen to have been seized, or the reasons for the seizure which may happen to have been known or to have been assigned at the time of *making* it."

Here again the language is general, and the court had before it no such statute as is said Section 3453.

Taylor v. U. S., 3 How. 197; U. S. S. C., January, 1845.

This too was a seizure of goods for illegal importation, and the point was made by claimant that the seizure should have been made by the Collector of Customs of New York instead of by the Collector at Philadelphia. The point was held to be not well taken—the court saying that:

> "* * * *the 70th section of the same act makes* it the duty of the several officers of the customs to make seizure of all vessels and goods liable to seizure by virtue of that act or of any other act respecting the revenue—as well within as without their respective districts." (Report p. 205.) (Italics ours.)

There was not before the court any such statute as Section 3453.

U. S. v. 508 Bbls., F. C. No. 15113; D. C. of N. Y., June 10, 1867.

Seizure *not* under Section 3453. The court said:

"Any person may make the seizure, as in the case of seizures under the customs, as the direction in *this statute* is no more specific than is the direction in *that one as to an officer of customs being required to make the seizure.*" (Report p. 1098, 1st Col.) (Italics ours.)

From this language it is to be inferred that "if *this statute*" was "specific as to the officer" to make seizure the holding would not have been as it was. Now—in the case at bar—Section 3453 is *specific* in that regard.

U. S. v. One Studebaker, 4 Fed. (2) 534; C. C. A. (9th), Mch., 1925.

Relates *only* to Section 3450.

The Sagatind, 4 Fed. (2d) 928; D. C. of N. Y., April, 1925.

Relates *only to Section 3450.*

U. S. v. One Ford, 272 U. S. 321, 71 L. Ed. 279, 283, 1st Col.; U. S. S. C., Nov., 1926.

Relates *only to Section 3450.*

We think this list includes all cases usually relied upon. From an inspection of them it will be seen that none of them construes said Section 3453. They have application where the statute does not name the officers to make the seizure.

The general language in some of those decisions to the effect that the government may *adopt* a seizure is not to be read out of its context. It has been said:

> "The language of any decision must be construed and understood as applying to the fact before it, and *where there is a legal right to seize but no formal authority, the Government may adopt the seizure—otherwise not.*"
>
> *U. S. v. Certain Malt,* 23 Fed. (2) 879.

V.

THE COURT ERRED IN ADJUDGING A FORFEITURE OF THE TRUCK TO HAVE BEEN INCURRED; BECAUSE THERE WAS NO EVIDENCE OF AN INTENT TO DEFRAUD THE REVENUE.

The question arose on the evidence (Bill of Exceptions, P. R. pp. 12, 13, 14). Request for and refusal to make Finding No. VI (Bill of Exceptions, P. R. p. 16) Assignment of Error No. VI (P. R. p. 21).

Discussion.

In view of *United States v. One Ford Coupe* (272 U. S. 321, 71 L. Ed. 279, Nov. 22, 1926), it would of course, be idle to contend that either Section 3450 or Section 3453 was *repealed* by the enactment of the

National Prohibition Act. *In that case, however, the court had before it the bare question of repeal or non-repeal,* for the question arose in the consideration of a motion to quash the information—virtually a demurrer; no facts—no proof—was dealt with, and the court was careful to say that:

> "*If intent to defraud* the United States *of the tax is established* by any competent evidence", etc. (71 L. Ed. p. 285, 1 Col.),

and what, under present conditions, constitutes proof of said intent was not touched upon, because "not before the court".

Now when it comes to the *question of intent* (and the *proof of intent*) to defraud the government of a tax; the fact that there is no way of paying a tax, and that the government would not accept tax money if it should be offered, negatives the existence of any intent to evade the payment of the tax. It seems to the writer to be incongruous for anyone, in these days, to contend that any maker of "moonshine" could possibly be actuated by, or could have, the intent to defraud the government of something which the government would not and could not, under any circumstances, accept—which it would be unlawful for any officer of the government to receive. In the days when it was possible to pay the tax, the burden was on the possessor to show that the tax had been paid or that it would be paid, etc., or that there was no intent to evade the payment of the tax; but in those days all whiskey was taxed or taxable. No such

presumption can prevail in these latter days—days in which only some whiskey is taxable—days when there is no possibility of the government accepting a tax on the whiskey in question here. In these days the zealous prohibition officers seize the "contraband", not with any design of collecting a tax thereon—not for the purpose of swelling the revenue nor of aiding in the enforcement of the Revenue Laws; nor does any such seizure accomplish (or aid in the accomplishment of) any such purpose. When, however, "contraband" is seizable under Revenue Acts it must be found in the possession, custody or control of some person whose purpose in having such possession and control is to hold, sell or remove that "contraband" in fraud of the Internal Revenue Laws and with the design to avoid payment of said taxes. How can a person have a "purpose to sell or remove" an article *"in fraud of the Internal Revenue Laws"* unless he knows, or at least thinks, that said selling or removal will defraud the revenue? How can such person do a thing with a design "to avoid the payment of said taxes" unless he knows, or at least thinks, that if he does do that thing he *will* avoid the payment of said taxes? and how could such person know or think *that*, when he must know that the government would not and could not receive *any such tax-money* if it were offered?

It is of course true that (ordinarily) a person will be presumed to intend the "natural and probable consequences of his act", but how can it be said that

"the natural and probable consequences" of the acts of the possessors of the contraband in question here, was an avoidance of the payment of a tax? Besides the said presumption does not obtain in those cases where the possession or action complained of is not interdicted by the statute *unless it is accompanied by the certain specific intent* stated in the statute (16 C. J., p. 83, Sec. 50).

This contention of "no proof of intent", "bottomed" as (we think) it is on common sense, is supported by abundant authority and we cite the following cases and rely upon them, *inter alios,* viz.:

U. S. v. One ton Wichita, 37 Fed. (2) 617 (D. C. of N. Y., 1930);

U. S. v. One Dodge Coupe, 34 Fed. (2) 943 (1929, D. C. of Mass.);

U. S. v. One Chevrolet, 21 Fed. (2) 477 (1927, D. C. of Ala.);

U. S. v. One Chevrolet, 25 Fed. (2) 238 (1928, C. C. of A., 5th);

U. S. v. One 5 ton Truck, 25 Fed. (2) 788 (1928, C. C. of A., 3rd);

U. S. v. One Buick, 34 Fed. (2) 318 (1929);

U. S. v. One Kissel, 289 Fed. 120 (1923, D. C. of Ariz.);

U. S. v. Milstone, 6 Fed. (2) 481, 483 (1925, D. of C.);

and it may not be amiss to make here an

Elaboration of Above Cited Cases.

Subsequent to U. S. v. One Ford Coupe, supra:

U. S. v. One ton Wichita, 37 Fed. (2d) 617 (D. C. of N. Y., 1930).

In this case it was sought to forfeit the automobile under R. S. U. S., Section 3450, on the ground of fraudulent evasion of taxes. There was no evidence that the taxes had not been paid. The court said:

> "There is no evidence whatever as to whether there were any stamps on the containers or not—Under these circumstances, mere illegal possession is not sufficient upon which to found an inference of evasion of taxes."

In the case at bar the only commodity upon which a tax could by any possibility be said to be imposed, or imposable, was the 150 gallons of Jack Ass Brandy. There was no evidence to show that the tax had not been paid. Sheean does not testify as to whether or not the containers of the brandy bore any stamps—cancelled or otherwise. It is true that he says "It is my belief that no tax had been paid" but this is not even a mere scintilla.

U. S. v. One Dodge Coupe, 34 Fed. (2d) 943; D. C. of Mass., Oct., 1929.

In this case 20 gallons of distilled spirits were found in an automobile. *On the applicability of U. S. v. One Ford Coupe,* supra, the court said:

"In United States v. One Ford Coupe, 272 U. S. 321, 71 L. Ed. 279, it was held by a bare majority of the court and against the view which had generally prevailed in the lower courts that R. S. U. S., Sec. 3450 was not superseded in cases of this character by the National Prohibition Act. The case arose on a motion to quash the libel. No evidence was taken, *and the question what constituted sufficient proof of intent* to defraud the U. S. of such tax" (R. S. U. S., Sec. 3450), *was not considered.*"

On the question of intent the court said:

"Section 3450 *is to be considered in the light of the conditions which existed when it was passed.* At that time intoxicating liquor was heavily taxed, but it was as legal to transport it over the roads as wheat. *The present day restrictions on the movement of liquor was then unknown. The section in question was designed in aid of the tax laws,* to prohibit the removal or concealment of liquor for the purpose of evading taxation. *The intent* to which the statute refers is an *actual* intent, which enters into the act of removal or transportation; it is, as the above quotation shows, a fact to be proved.

In the present case the liquor was *outlawed property.* To disclose it to the government officers would have *exposed it not to taxation, but to immediate forfeiture.* Those transporting it undoubtedly knew that it had not been taxed; but there is no evidence that their transportation of the liquor was undertaken with any thought or

intent of thereby evading taxation. *I do not think that such an intent is inferable from the facts shown. An intent to violate the prohibition law,* which undoubtedly existed, *is not the same thing as the special intent which this statute requires. There is no occasion to extend beyond its plain and very narrow provisions this extreme section the very validity of which is so deeply open to question.*"

U. S. v. One Chevrolet, 21 Fed. (2d) 477; D. C. of Ala., Aug., 1927.

Judge Clayton, commenting on *U. S. v. One Ford Coupe,* supra, said:

> "* * * it does not seem to me that anything was definitely decided except that Judge Grubb, the District Judge, should not in that case have dismissed the libel on motion, but should have heard it on its merits."

and *on the question of proof of intent* he quotes with approval the following language of the court in *U. S. v. Milstone,* infra, viz.:

> "The failure to pay the revenue tax was a mere incident of the illegal possession and transportation. This must be so since the possession and transportation were illegal in any event, regardless of the payment or non-payment of the tax. In fact there was no way in which Jackson might have paid the tax without inviting immediate prosecution for illegal possession. *How then may it be said in reason that mere illegal transporta-*

tion constitutes a 'removal' of liquor with intent to defraud the United States of such tax within the meaning of Section 3450?"

U. S. v. Gen. Motors, 25 Fed. (2) 238; C. C. A., 5th Cir., April, 1928.

Affirms the decision of Judge Clayton, supra, and says *en passant:*

"Assuming that it is *possible to prove* that one who uses a vehicle in the removal or for the deposit or concealment of untaxpaid liquor has the necessary intent under Section 3450 to defraud the United States of a tax which *existing law neither requires nor permits to be paid",* etc.

U. S. v. One 5 ton Truck, 25 Fed. (2) 788; C. C. A., 3d Circuit, April, 1928.

An abandoned truck containing unstamped liquor was sought, to be forfeited on the ground that the liquor was possessed with intent to defraud the U. S. of the tax. *On the question of proof of intent* the court said:

"As in criminal law it (the statute) contains two elements, an act and an intent. Both must be present. When both are present and cooperate the offense is complete.

* * * * * * *

the intent therefore is the essence of the crime * * * We cannot hold that the presence of liquor in a form which in the circumstances can-

not disclose it to be tax unpaid, raises a presumption of the requisite intent in lieu of proof by competent evidence."

U. S. v. One Buick Automobile, 34 Fed. (2) 318; Aug. 3, 1929.

Here the *culprit* was the owner of the automobile which had been used in the transportation of the contraband whiskey, and *he swore* that he did not transport, possess or conceal with intent to defraud the United States of a tax, but with the intent to commit an offense against the National Prohibition Act. Held, that the intent was negatived; the court saying that ignorance is no excuse for crime *except*

"where, as in this case, specific intent is essential to a crime—and ignorance of the law negatives the existence of such intent", citing 16 C. J. 85.

In the case at bar, the truck, when seized, was not in the immediate possession of either the C. I. T. Co. (claimant) or of Belli (the purchaser—conditional—from said claimant), but of some third persons not shown to be connected in any way with C. I. T. Corp. or Belli. "The agents started to apprehend", but one got away and he apprehended the other (Bill of Exceptions, P. R. p. 12), but it does not appear what was the name of the one who "got away" nor what was the name of the one who was "apprehended". The claimant, therefore, not knowing the name of

either one of these men, was unable to place either of them on the witness stand, for the purpose of eliciting a categorical statement of his intent (as was done in the case last above cited); but nevertheless, in the case at bar there was no evidence of any intent on the part of anyone to "defraud the revenue" nor of any circumstances from which such specific intent could be inferred.

Before U. S. v. One Ford Coupe, supra:

U. S. v. One Kissel, 289 Fed. 120; D. C. Arizona, May, 1923.

Automobile sought to be forfeited under Section 3450, R. S. U. S., because it was used in concealment of unpaid-tax narcotic, with intent to defraud the U. S. of the tax.

Dooling, Judge (p. 122):

> "But it requires more to warrant the forfeiture of the automobile than the deposit or concealment of the drugs therein. *They must be so deposited or concealed with intent to defraud the United States of the tax* imposed on them, and *the burden is upon the Government to show that such was the intent.* Means, the driver of the car, was so far as appears neither importer, manufacturer, producer, or compounder of the drugs, nor connected in any way with them. His possession of the drugs was unlawful, and if he disclosed such possession for the purpose of offering to pay the tax, he would subject himself to

arrest and the drugs and automobile to seizure. His concealment of the drugs is to be attributed, in my judgment, to the fact that he knew he was engaged in an unlawful business, rather than to the fact that he was trying to evade the payment of a tax of one cent. It should be a clear case which would warrant the forfeiture of an automobile valued at $1400.00 and belonging to one not connected with the transaction for failure on the part of some one unknown to pay to the government a *one cent* tax."

U. S. v. Milstone, 6 Fed. (2d) 481, 483; D. of C., 1925 (see, supra, p. 28).

The "guilt of the truck", if any, consisted in the fact, if it be a fact, that *it was found in a certain yard or enclosure.* Which yard or enclosure? That yard or enclosure in which were found jack ass brandy and raw materials. What jack ass brandy and raw materials? That which was possessed by John Doe and Richard Roe *with* intent to evade the payment of the tax. No such brandy and raw materials has been shown to have been possessed by anyone with any such intent. The government then—not having proved that the possession of the alleged contraband was with *intent to evade* the payment of the tax—has failed to establish any case against the truck.

VI.

THE COURT ERRED IN ADJUDGING A FORFEITURE OF THE TRUCK TO HAVE BEEN INCURRED; BECAUSE THE EVIDENCE SHOWED THAT ONLY A PART OF THE TRUCK WAS WITHIN THE ENCLOSURE.

The question arose on the evidence (Bill of Exceptions, P. R. pp. 12 and 13), request for, and refusal to make Finding No. V (Bill of Exceptions p. 16) Assignment of Errors No. IV (P. R. p. 20).

Discussion.

No ground of forfeiture is alleged except that the truck was within the yard or enclosure in which the still, the raw materials and the jack ass brandy were found. Claimant went to trial to meet that charge alone; if there be evidence relating to any other cause of forfeiture, that other cause of forfeiture could not be urged at the trial or here unless the information was amended—a thing which was not done (*U. S. v. 4800 Bbls.,* F. C. 15153). If an application to amend had been made and allowed claimant would have asked for a continuance.

The government then must prove that the *truck was within* the yard or enclosure. This the government has not done. The evidence on that point was as follows,—Sheean, testifying:

> "The truck was about 50 yards from the barn (P. R. 12). The front wheels were inside and the rear wheels were outside" the yard (P. R. p. 12).

> "I would say it was just about on the line. It was part over the line and rear part outside of this particular enclosure. The gate had been opened and they were proceeding in" (P. R. p. 13).

A truck does not consist of only front wheels—it cannot be said to be within an enclosure unless all and every part, or at least the major part, is within the enclosure. If the location within the enclosure of only the front wheels be sufficient, then why would not the like location of the bumper or of a fender be sufficient? If the location of the front wheels is sufficient to constitute the truck as being *within* the enclosure, why is not the location of the rear wheels sufficient to constitute the truck as being *without* the enclosure? The law does not decree the forfeiture of a truck which is "about to enter" the enclosure—which is "attempting to enter the enclosure"—which is "partly within and partly without the enclosure". If the law requires that a certain thing be done within 10 days, is it a compliance when it is only half done within that time?

We think this is a substantial point, but even if it were the acme of technicalities a person, who knows that the government knows him to be innocent of any wrong doing, would be justified in raising the question and in relying upon it as a defense to an attempt to forfeit his property by making a strained and twisted application of a statute so unfair, so inequitable and so inapposite as is Section 3453, R. S. U. S. No good toward the protection of the Internal Revenue does

such an application of an effete statute accomplish; no good does it do the cause of prohibition.

> "Forfeitures are not favored—they must be within the *letter* and *spirit* of the law."
>
> *U. S. v. Mattio,* 17 Fed. (2d) 879.

General.

Perversion of the Statute: The Prohibition Agent says "but one got away and he apprehended the other" (P. R. 12), but it does not appear that anyone was prosecuted for violation of the National Prohibition Act or that any article except this truck (the property of innocent persons) was seized or destroyed or sought to be forfeited. Section 3453, R. S. U. S., is an old Revenue Statute enacted to aid in the collection of revenue, and for no other purpose, but in (what cannot be regarded as anything but) mistaken zeal has been unearthed and is sought to be applied as an aid to the enforcement of the eighteenth amendment—a purpose entirely alien to the purpose of its enactment. Speaking of such a perversion the U. S. District Court for the Western Division of New York, said:

> "The Department of Prohibition is *now attempting* to make seizures under this old Revenue Act. The case under discussion and a number of other cases now before me are in fact ordinary violations of the National Prohibition Law. That Act furnishes an adequate remedy and in the judgment of Congress adequate punishment for its violation. It is not necessary or desirable for the Prohibition Department *to try to operate* under an old taxing statute which, while tech-

> nically in force *was not intended to be used to enforce the Eighteenth Amendment to the Constitution.*"
>
> *In re Hurley,* 37 Fed. (2) 397.

and so, too, the case at bar has its genesis in "an ordinary violation of the National Prohibition Act". In *Richbourg Motor Co. v. U. S.* (74 L. Ed. 503: "Adv. sheets No. 13—case decided May 19, 1930) the Supreme Court declines to say "whether if for any reason the seizure cannot be made or the forfeiture proceeded with, prosecution for any offense committed must be had under the National Prohibition Act rather than other statutory provisions", but nevertheless, we think that the whole tenor of the decision is to "frown upon" the effort to pervert a Revenue Statute into an implement for the enforcement of the Volstead Act.

Considering the drastic character of Section 3453, R. S. U. S., together with what has been said, we respectfully urge that no such attempted perversion ought to be allowed to succeed if it is possible to avert such success by any fair construction of the statute or by any intendment consistent with reason and justice.

Respectfully submitted,

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No. 6125

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

C. I. T. Corporation, a corporation,
Appellant,

vs.

United States of America,
Appellee.

BRIEF OF APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

Geo. J. Hatfield,
United States Attorney,

Albert E. Seleis,
Asst. United States Attorney,

Attorneys for Appellee.

Smith-Barnes & Kelly Co., S. F.

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TABLE OF CASES

No. 6125

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

C. I. T. CORPORATION, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Brief of Appellee

JURISDICTION

This case comes here on appeal from order of forfeiture of one Graham Truck, the subject of the property in controversy in the libel proceedings, made by his Honor Judge A. F. St. Sure at Sacramento on February 14, 1930.

ISSUES

(a) *Libel of Information.* The libel filed by the United States Attorney for the Northern District of California alleges in substance that on the 17th day of March, 1928, in Yolo County, a Prohibition Agent seized the Graham Truck in question at the time in a

yard and enclosure known as the McGregory Ranch, wherein was also found one 350 gallon alcohol still complete, 10,000 gallons of mash, 150 gallons of jackass brandy, and 36 sacks of corn sugar; that such articles and raw material were possessed with the intent to manufacture intoxicating liquor of a kind subject to tax, and upon which there was then due certain taxes which had not been paid, and such articles and raw material were possessed and concealed with intent to defraud the United States of those taxes, and that such possession and concealment was a violation of the provisions of Section 3450 of the Revised Statutes, and concluded with the usual prayer for condemnation, etc.

(b) *Demurrer and Answer.* The C. I. T. Corporation (plaintiff in error) appeared as claimant and filed its demurrer and answer setting forth in substance that it was a Delaware corporation doing business in California, and lacking sufficient knowledge or information generally and specifically denied all of the allegations of the libel, and further affirmatively alleged that it was the owner of and entitled to the possession of the truck, and that if such articles and raw material were in the truck at the time of its seizure they had been placed there without the connivance or knowledge of the claimant, concluding with the usual prayer for immediate possession.

QUESTIONS PRESENTED

The specifications of error, twelve in number, have been narrowed and consolidated into six, and are:

1. The Court erred in overruling the demurrer and in treating "Section 3450" as surplusage, even though

all of the allegations of the libel showed it clearly to have been well drawn under Section 3453, R. S.

(Assignment of Error No. 1, R. 19)

2. That the Court erred in overruling the demurrer since the libel failed to allege in substance that the still, mash, corn sugar and jackass brandy found in the yard with the truck "were to be there manufactured into contraband."

(Assignment of Error No. 6, R. 21)

3. That the Court erred in rendering judgment of forfeiture without having made any findings of fact.

(Assignment of Error No. 3, R. 20)

4. That the Court erred in adjudging a forfeiture of the truck, since the person who made the seizure was a Prohibition Agent and not a "Collector or Deputy Collector" or one who had been specially authorized by the Collector of Internal Revenue to make seizure.

(Assignment of Error No. 9, R. 22)

5. The Court erred in adjudging a forfeiture because there was no evidence of an intent to defraud the United States.

(Assignment of Error No. 12, R. 23)

6. The Court erred in adjudging a forfeiture of the truck because the evidence showed that only a part of the truck was within the enclosure.

(Assignment of Error No. 4, R. 20)

STATEMENT OF THE CASE

Since the entire evidence and the facts are all contained in the brief story of one witness, and a stipulation, they may be adopted as a summary of the facts and are as follows:

Joseph R. Sheean, for the United States, testified as follows:

> "I am, and on March 17, 1928, was a Federal Prohibition Officer. On that date I had occasion to visit premises in Yolo County on which was located a still. At the Miagregoria ranch, four miles south of Westgate, in Yolo County, I found a 150-gallon alcohol plant complete, with 1000 gallons of mash complete and 150 gallons of jackass brandy, and such other supplies for a still. The still was enclosed within a large barn. Found the truck in the premises outside of the barn—about 50 yards. Around the barnyard was a one by six board fence. They had opened the gate and they started in the enclosure—the agents started to apprehend, but one got away and he apprehended the other—the front wheels (of the truck) were in the yard and the hind wheels just going across the line and when the agents came out of the barn the men attempted to get away and one did get away.
>
> "On the truck was some Argo sugar—that is used for the distillation of spirits—I found similar sugar at the still. It is my belief that no tax had been paid.
>
> "The truck was not moving when I first saw it. I was on the premises—it came on the premises afterwards. We waited for it, on information from one of the men in the still-room that the truck would arrive around midnight. The truck was partly in the enclosure when they tried to get away. The gate had been opened—I wasn't at the gate. I would say the truck was just about on the line—it was part over the line, and the rear part

outside of this particular enclosure. The gate had been opened and they were proceeding in.

"I found attendants on the place—Frank Poncini and Segundo Romini.

"Frank Poncini, Segundo Romini, Jim Gustalli and Pete Spinoglio were afterwards prosecuted in the State courts and each was fined One Thousand Dollars."

And plaintiff rested.

After which the following stipulation was entered into:

"The automobile in question in this libel was at the time of its seizure and now is owned by the claimant here, C. I. T. Corporation, but had been by said owner delivered into the possession of one Louis Belli under and according to the terms of a conditional bill of sale wherein said C. I. T. Corporation has the title so reserved to claimant until the purchase price of $1628 should have been fully paid. Such purchase price has not been fully paid, in whole or at any time since the seizure herein, and the amount now due and unpaid thereon is the sum of $825. And that

"The C. I. T. Corporation claimant in this suit did not have any knowledge as to the purpose for which this truck was being used or put, and that if the president of the claimant corporation were present he would testify—

"That before the purchase of said contract claimant herein investigated the standing of the said L. Belli as to his financial ability to carry out the terms of the afore-mentioned contract and as to whether or not the said L. Belli was a good moral risk. This investigation was conducted partly by claimant and partly by Messrs. Hooper and Holmes, an investigating agency of San Francisco, California. Inquiry was made of the Sacramento banks as to the financial status of the said L. Belli and the reports therefrom were satisfactory. It was ascertained that the said L. Belli had pur-

chased other automotive equipment and had satisfactorily completed his contracts for the purchase thereof. Inquiries were made from neighbors living in close proximity to the said L. Belli and the reports emanating therefrom were good. After said investigations and reports were obtained claimant herein determined that the said L. Belli was a good moral and financial risk."

And Claimant rested.

STATUTES INVOLVED.

United States Revised Statutes, 3453 (U. S. C., Title 26, Section 1185), provides—

> All goods, wares, merchandise, articles, or objects, on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district, or by such other collector or deputy collector as may be specially authorized by the Commissioner of Internal Revenue for that purpose, and shall be forfeited to the United States. And all raw materials found in the possession of any person intending to manufacture the same into articles of a kind subject to tax for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax; and all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure where such articles or raw materials are found, may also be seized by any collector or deputy collector, as aforesaid, and shall be forfeited as aforesaid. The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the district court of the United States for the district where such seizure is made.

Other statutes bearing on the question presented will be referred to in the argument.

I. THE COURT ERRED IN OVERRULING THE DEMURRER AND IN TREATING "SECTION 3450" AS SURPLUSAGE, EVEN THOUGH ALL OF THE ALLEGATIONS OF THE LIBEL SHOWED IT CLEARLY TO HAVE BEEN DRAWN UNDER SECTION 3453, R. S.

The information in libel stated in all things a right of forfeiture under Sec. 3453, U. S. R. S. Very properly the Court disregarded as surplusage "3450" which alone could not add to a defective information or vitiate a good one. Pleading by information under this section is sufficient if generally it follow the language of the statute.

U. S. v. Seventeen Empty Barrels, Fed. Cas. No. 16255.

The technical precision of an indictment is not required.

U. S. v. 396 Barrels, Fed. Cas. No. 16,503.

But, even if it were an indictment the Court would disregard the enumeration of the statute for the actual language employed.

Addy vs. U. S., 263 F. 449, p. 451.

This specification is without foundation, and appears to be practically abandoned.

II. THAT THE COURT ERRED IN OVERRULING THE DEMURRER SINCE THE LIBEL FAILED TO ALLEGE IN SUBSTANCE THAT THE STILL, MASH, CORN SUGAR AND JACKASS BRANDY FOUND IN THE YARD WITH THE TRUCK "WERE TO BE THERE MANUFACTURED INTO CONTRABAND."

In support of this specification it is argued that the information of libel should have but did not allege that the truck was found with implements and other personal property "where they were intended to be used" to manufacture the contraband. Such an argument is

untenable, since the information of libel does allege that the Prohibition Agent seized * * * "one Graham Truck * * * which was then * * * in the yard and enclosure of * * * the McGregory Ranch * * * in which said yard and enclosure there was also found * * * one 350 gallon still complete, 10,000 gallons of mash, 150 gallons of jackass brandy and 36 sacks of corn sugar." From such language the clear and only inference to be drawn is that a complete distillery was present and in successful operation, with reserve supplies of raw material. If one came upon such a scene as is thus described in the information the first and only conclusion which could be drawn would be that the property was intended to be used to "manufacture contraband liquor." Certainly it is a standardized presumption that that which has been used as a distillery was in fact "intended to be used" as such. The only suggested authority that the indictment should have but did not allege that the truck and other personal property was in the yard *"where they were intended to be used,"* cited by plaintiff in error is *United States v. 16 Hogshead,* Fed. Cases 16,302. The other two cases cited do not even touch upon this question. But neither is that case authority for the proposition for which it is cited. The Court in the *16 Hogshead case,* relied upon, does not stress the purpose for which the property was intended to be used, but rather it stresses the necessity of an allegation that the property "should have been found on the premises of the manufactory." Here is a full quotation from that authority upon this point:

"But the fifth article, in relation to the tools, implements, etc., is clearly defective, in not alleging they were found in the place or building, or within the yard or inclosure where they were intended to be fraudulently used. The object of this provision obviously was to prevent the future use of the tools and implements for a fraudulent purpose. *And the statute makes it material, as a ground of forfeiture, that they should be found on or about the manufactory in reference to which the charges of fraud are made. * * * It is a just and reasonable requirement of the statute that to subject them to forfeiture the property should have been found on the premises of the manufactory.* And if this, under the statute, is a necessary basis of forfeiture, it must be set forth in the information."

U. S. v. 16 Hogshead, Fed. Cases No. 16,302.

Neither the authority cited in behalf of this specification of error, nor the language of the information of libel, gives it support. This information of libel is verbatim with many of those which have come uncriticized to the attention of this Court in the past four years, and identical with the information of libel in *Pacific Finance Corporation vs. United States* (9th), 39 Fed. (2d) 427, upon which a similar decree of forfeiture was sustained.

III. THAT THE COURT ERRED IN RENDERING JUDGMENT OF FORFEITURE WITHOUT HAVING MADE ANY FINDINGS OF FACT.

It is argued by plaintiff in error, "in the case at bar we have a judgment in a civil action at law (tried by the Court) unsupported by *any* finding of fact—either general or special; and therefore it must be that the judgment cannot stand", and then concludes "this

Court then will review the evidence for the purpose of determining its sufficiency."

(a) Special findings were requested by plaintiff in error and refused. This *Rule 42* of the *Rules of Practice* United States District Court, Northern District of California, authorizes:

> "In actions at law in which a jury has been waived by written stipulation filed by the parties, *it shall be in the discretion of the Court to make special findings of fact upon the issues raised by the pleadings. Where such request is made and granted,* no judgment shall be entered until the findings shall have been signed and filed or waived as hereinafter provided."

After properly refusing special findings the Court then made its own finding which was general, to-wit: the order of forfeiture (R. 10). It can be unquestioned that general findings may constitute only a decision of the case.

Aetna Life Ins. Co. v. Board of County Commissioners (8th), 79 Fed. 575, p. 576, was a case tried before the Court without a jury upon an agreed statement of facts. In supporting the general findings of the District Court in that opinion it is stated:

> "It rested in the discretion of the court to make a general finding, instead of special findings. The finding might be as general as the verdict of a jury, and have the same effect."

As a matter of actual practice in libel cases of this nature the usual method is to deny the request for special findings and enter the order of forfeiture or of dismissal, in which latter event the order constitutes the general finding.

(b) Failure of plaintiff in error to move for judgment on the ground of insufficiency of evidence prevents its review by the Appellate Court.

The record discloses that whatever requests for findings plaintiff in error may have made at no time were they coupled with alternative request for judgment. It is too well settled to require more than citation of authorities that the failure to so move for judgment prevents any review of the evidence on appeal. *O'Brien's Manual of Federal Appellate Procedure,* page 5, paragraph 4 states:

> "If a request is made for special findings, *coupled with alternative request for judgment,* and special findings are not made by the court and exception is taken either to the refusal to give special findings requested, if any are made, or to the refusal to find generally by directing judgment, then the question of the sufficiency of evidence is properly saved for review in the appellate court."

Plaintiff in error made its request for special findings but failed to move for judgment, and as a result is barred from a consideration of the sufficiency of the evidence.

Feather River Lumber Co. v. United States, 30 Fed. (2d) 642, was a case in which at the close of the trial (without a jury) the plaintiff in error asked for special findings but failed to move for judgment. The Court said:

> "The defendant assigns as error the denial of its motion for dismissal and non-suit at the close of the government's case, made on the ground that the evidence adduced was insufficient to sustain a finding in favor of the plaintiff. The denial of that motion cannot avail the defendant as ground

> for reversing the judgment. After it was denied the defendant proceeded to introduce its testimony, and at the close of the trial it made no motion for judgment on the ground of the insufficiency of the evidence to sustain the complaint. The rule that under the circumstances here presented the evidence cannot be reviewed by an appellate court has been so frequently applied by this and other courts as to render unnecessary a review of the authorities."
>
> *Deupree v. United States,* 2 Fed. (2d), 44, 45;
> *Clark v. United States,* 245 Fed. 112;
> *Fleischmann Co. v. United States,* 270 U .S. 349.

It will thus be seen that not only is this specification of error without foundation, but that a failure on the part of the plaintiff in error to protect is record by the appropriate motion for judgment has eliminated any consideration on this appeal of the sufficiency of the evidence. This specification would seem further to lack point since all of the evidence is either undisputed or stipulated to. But certainly, looked at from any point of view, the specification is without merit.

IV. THAT THE COURT ERRED IN ADJUDGING A FORFEITURE OF THE TRUCK, SINCE THE PERSON WHO MADE THE SEIZURE WAS A PROHIBITION AGENT AND NOT A "COLLECTOR OR DEPUTY COLLECTOR" OR ONE WHO HAD BEEN SPECIALLY AUTHORIZED BY THE COLLECTOR OF INTERNAL REVENUE TO MAKE THE SEIZURE.

At page 16 of the brief of plaintiff in error it is admitted:

> "It will doubtless be contended *that other decisions* are to the effect that "anybody" can make a seizure, and that the government adopts the seizure by seeking enforcement of the forfeiture."

Not only several, but each case which deals with the

subject so holds, from the very earliest (*Hoyt v. Gelston,* 3 Wheat., 247,310)) to the very last (*United States v. One Ford Coupe*, 272 U. S. 321 at p. 325). Claimant then proceeds to review that unbroken line of authorities upon this subject, and to dispute each judicial utterance upon the point in controversy. Justifiedly it is stated there is no single case which holds in conformity with the claimant's contention. Its brief does not attempt to cite any authority so holding, and the only support for its contention is the argument of counsel. That argument in substance is that, though the unbroken line of authority is against the claimant, each one of those decisions relates to a forfeiture in a case where the statute did not specifically designate the seizing officers as does Section 3453, U. S. R. S., and for that reason Sec. 3453 U. S. R. S. does not come within their purview. A consideration of one, or at most three cases, will dismantle claimant's argument.

United States v. One Ford Coupe, 272 U. S. 321 at p. 325, was a libel against a Ford Coupe brought under Section 3450, which had been seized by the Prohibition Director (instead of, as it was contended it should have been, by an Internal Revenue officer). This decision is dealing primarily with Section 3450, U. S. R. S., which does not designate specifically the officer who must make the seizure. But when Justice Brandeis disposed of the contention urged by claimant that the seizure was made by an unauthorized person he does not limit the rule to a statute such as 3450 U. S. R. S., but on the contrary expressly goes out of his way to take in every Federal statute upon the subject of for-

feitures. Observe his language:

> "The sole question for decision is, whether an automobile, which was seized by a prohibition agent, may be forfeited under Sec. 3450 if it was being used for the purpose of depositing or concealing tax-unpaid illicit liquors with the intent to defraud the United States of the taxes imposed thereon. Obviously, the mere fact that the seizure of the automobile had been made by the prohibition director (instead of by an internal revenue officer) does not preclude the possibility of a proceeding to forfeit under Sec. 3450. *It is settled that where property declared by a federal statute to be forfeited because used in violation of federal law is seized by one having no authority to do so, the United States may adopt the seizure with the same effect as if it had originally been made by one duly authorized.*" (Italics ours)
>
> *The Caledonian,* 4 Wheat. 100, 101;
> *Taylor v. United States,* 3 How. 197, 205;
> *United States v. One Studebaker Seven-Passenger Sedan,* 4 F. (2d) 534.

Very obviously when Justice Brandeis was writing this opinion he had in mind that section of the Internal Revenue Laws three sections following the one under discussion (Sec. 3453, U. S. R. S., under which this libel is brought), and advisedly stated the all inclusive right of forfeiture in the Government for any seizure of property used in violation of the federal law, no matter how lacking the authority of the person so making the seizure.

It is interesting to note that in support of this doctrine Justice Brandeis considered the Ninth Circuit to be in full accord with the principle which he stated, for in support of it he cites with approval *United States v. One Studebaker Sedan,* 4 Fed. (2d) 534.

United States v. One Studebaker Sedan (9th), 4 Fed. (2d) 534, was a case in which police officers of Seattle seized the car in question which the United States libeled, and it was contended that such seizure was void. In this case the Ninth Circuit considers the line of cases discussed in claimant's brief, and adopting the language of *Taylor v. United States,* 3 How. 197, holds the seizure valid with the following language:

> "But the objection itself has no just foundation in law. At the common law any person may, at his peril, seize for a forfeiture to the government, and, if the government adopts his seizure, and institutes proceedings to enforce the forfeiture, and the property is condemned, he will be completely justified. So that it is wholly immaterial in such a case who makes the seizure, or whether it is irregularly made or not, or whether the cause assigned originally for the seizure be that for which the condemnation takes place, provided the adjudication is for a sufficient cause. This doctrine was fully recognized by this court in Hoyt v. Gelston, 3 Wheat. 247, 310, and in Wood v. United States, 16 Peters, 342, 358, 359. And from these decisions we feel not the slightest inclination to depart."

United States v. One Ox-5 American Eagle Airplane (9th), 38 Fed. (2d) 106, was a case in which the United States sought forfeiture of the Airplane in question for a violation of the Customs Laws. The Airplane had been seized by two Deputy Sheriffs in the State of Washington, and upon their seizure, adopted by the Government, the libel was filed. Claimant excepted thereto among other grounds that the seizure was illegal in that it was not made by duly authorized officers of the United States Customs. The opinion discusses generally all of the statutes of the United States

under which forfeitures may be made, and cites with approval and quotes that portion of the *United States v. One Studebaker Sedan* (supra) in which it is stated that if the government adopts the seizure it "is wholly immaterial in such a case who makes the seizure, or whether it is irregularly made or not, or whether the cause assigned originally for the seizure be that for which the condemnation takes place, provided the adjudication is for a sufficient cause."

Unquestionably the rule has always been, and is today, that the adoption by the Government of a seizure under the Internal Revenue Laws cures any defect in the competency of the person who made the seizure.

The only authority for a contrary statement in application to the present libel is the suggested argument of claimant's counsel. But no case supports the contention.

V. THE COURT ERRED IN ADJUDGING A FORFEITURE BECAUSE THERE WAS NO EVIDENCE OF AN INTENT TO DEFRAUD THE UNITED STATES.

Page 12 of the Apostles shows that Prohibition Agents entered the McGregory Ranch and discovered a huge still and the large quantity of spirituous liquors and raw materials for the manufacture thereof all contained in a secreted place, to-wit: an old barn; that one of the individuals driving the truck containing raw materials similar to that at the still made his escape when approached by the Agents; that the location of the still was unknown to the Government, and that no tax had been paid. Under such circumstances there

must, of course, be a standardized inference that such a still is illicit and that it is being maintained and secreted with intent to defraud the Government of the tax. *Pacific Finance Corporation v. United States,* 39 Fed. (2d) 427, is a case precisely in point and identical information of libel was the pleading used in that case. In concluding that the only inference to be drawn from such facts was that the still was being operated in violation of the Prohibition Law and with intent to avoid the payment of the tax, this Court stated:

> "From the facts stipulated, the trial court was justified in drawing the inference that the distillery was being used in fraud of internal revenue laws and with design to avoid the payment of taxes within the meaning of section 3453. According to the stipulation, there was a distillery in active operation, with a 40 horse power steam boiler with 120 pounds' steam pressure, reasonably requiring supervision, but with no one visible in charge of the premises or of the operations. The only person appearing at the premises was the truck driver with a companion truck to the one already on the premises, which was purchased at the same time, by the same individual, upon the same terms, which truck, as the one already there, was loaded with 5-gallon cans. This truck driver promptly escaped from the premises without unloading, and abandoned the truck upon the highway, and fled upon the approach of prohibition officers. From these facts the conclusion is irresistible that the operations carried on were not only a violation of the prohibition law, but also with the intent of avoiding the payment of revenue tax on the spirits there distilled."

Certainly intent to defraud is to be drawn from the surrounding facts and circumstances, and in this case that shows an illicit still complete, a large quantity of

raw materials and supplies, and a large quantity of the manufactured product, housed by a building camaflouged with the character of a barn. In view of these facts, and this last expression by the Ninth Circuit Court, this specification appears to be wholly unfounded.

VI. THE COURT ERRED IN ADJUDGING A FORFEITURE OF THE TRUCK BECAUSE THE EVIDENCE SHOWED THAT ONLY A PART OF THE TRUCK WAS WITHIN THE ENCLOSURE.

Funk and Wagnalls New Standard Dictionary defines *within* to be synonymous with *inside*. But the courts broadly have often passed upon the meaning of the word in its various uses to much better advantage for the case at bar. For instance, in the law of fire insurance (not a good analogy, because of the civil contractual relation) no such technical use of the term "within any yard" urged by claimant, is anywhere to be found. See *Cooley's Brief on Insurance,* Vol. 6, p. 4925, et seq.

In *White v. County Court,* 76 W. Va., 727; 86 S. E. 765, where "within the county" as used in the Code granted to County Courts power to pay for making improvements and keeping in order "the whole or any part of any county road within the county" was held to include roads which were *partly* within.

In *Rolls v. Parish,* 105 Tex. 253; 149 S. W. 810, 812, it is held that a county seat is "within five miles" of the geographical center of the county, where any part of the county seat would be included within a circumference described around such center with a five mile

radius, although the whole of the county seat *was not within such circumference.*

Pacific Finance Corporation v. United States (9th) (supra) is, however, the leading case upon this question, and decisive. The last paragraph of that opinion passes upon the right of forfeiture under this section a truck which has been upon but had left the premises to avoid seizure. In this case the truck was "within the yard"—at least in part, and entered no further because the driver stopped to become a fugitive for the crime which he was committing through the assistance of the truck.

CONCLUSION

In view of the foregoing considerations it is submitted that neither of the specifications on appeal has substantial foundation.

Respectfully submitted,

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Attorneys for Appellee.

No. 6125

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

C. I. T. CORPORATION, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

APPELLANT'S PETITION FOR REHEARING.

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Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

APPELLANT'S PETITION FOR REHEARING.

To the Judges of the above entitled Court:

Appellant respectfully petitions for a rehearing of the appeal in this cause and to that end submits the following:

I.

INTENT TO DEFRAUD THE REVENUE.

The opinion states that:

> "Appellant claims that inasmuch as the liquor was being manufactured with the intent of vio-

> lating the National Prohibition Act it could not be said to have been *the intent* of the manufacturers to violate the revenue law. This point is disposed of by the decision of the Supreme Court in U. S. v. One Ford Coupe, 272 U. S. 321." (Printed Opinion, p. 1.) (Italics ours.)

With all deference, we beg leave to urge (A) that such was not appellant's contention as made, and (B) that the case of *U. S. v. One Ford Coupe* (supra) does not dispose of appellant's contention as made, viz.:

A.

Appellant's contention was not that the fact that the liquor was being manufactured with the intent of violating the National Prohibition Act, *precluded* the *possibility of proof* that said manufacture was also with the intent of defrauding the revenue: on the contrary the contention was that the existence of an intent to violate the National Prohibition Act was *not ipso facto evidence* of an intent to defraud the revenue; and that as there was in the case at bar *no proof of intent to defraud the revenue* the government's case failed because of no proof of the specific intent required by the statute—proof of intent to violate the National Prohibition Act being *no proof* of intent to defraud the revenue. Appellant cited many cases so holding—cases which appellant contends are strictly in point. (See list of cases and extended quotations therefrom—Appellant's Brief, pp. 25 to 32 incl.)

B.

The *Ford Coupe case* (supra) so far from disposing of the question of proof of intent does not touch thereon except to say that it is possible the culprit may have both intents—and that

> *"If intent to defraud* the United States *is established by any competent* evidence" etc. (272 U. S. 321; 71 L. Ed. 285—1st col.)

The case does not anywhere hold that *the intent to defraud the revenue* is shown by proof of intent to violate the National Prohibition Act; and speaking of this decision it has been said that

> "The case arose on a motion to quash the libel. No evidence was taken and the question what constituted sufficient proof of intent to defraud the U. S. of such tax was not considered." (*U. S. v. One Dodge Coupe,* 34 Fed. (2d) 943—Appellant's Brief, p. 26.)

and

> "It does not seem to me that anything was decided except that Judge Grubb, the District Judge, should not in that case have dismissed the libel on motion, but should have heard it on its merits." (*U. S. v. One Chevrolet,* 21 Fed. (2d) 477—affirmed in *U. S. v. Gen. Motors,* 25 Fed. (2) 238—Appellant's Brief, pp. 28, 29.)

To appellant's contention then of *"no proof of intent to defraud the revenue",* it is obviously no answer to say that "There might have been such intent—*proof or no proof".*

WHEREFORE petitioner prays for a rehearing and that if this petition is denied this court will make its order staying the mandate herein for a period of 30 days in order to enable petitioner to apply to the Supreme Court for a Writ of Certiorari.

Respectfully submitted,

HINDSDALE, OTIS & JOHNSON,
Attorneys for Appellant and Petitioner.

ROBERT W. JENNINGS,
Of Counsel.

CERTIFICATE.

I hereby certify that the foregoing Petition for Rehearing is made in good faith and not for the purpose of delay, and that in my opinion it is well founded in point of law.

ROBERT W. JENNINGS,
One of Counsel for Petitioner.

NO. 6126

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

FRANCES MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON, JR., FRANCES MACKINNON COIT and JOHN S. DELANCEY, Guardian of JOHN MACKINNON DELANCEY, a Minor,

Appellees.

Transcript of Record

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

The James H. Barry Co., San Francisco

NO. 6126

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

FRANCES MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON, JR., FRANCES MACKINNON COIT and JOHN S. DELANCEY, Guardian of JOHN MACKINNON DELANCEY, a Minor,

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Transcript of Record

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

INDEX.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

George J. Hatfield, United States Attorney; Chellis M. Carpenter, Esq., Assistant United States Attorney, Post Office Building, San Francisco, California, Attorneys for Plaintiff.

Carey Van Fleet, Esq., 640 Mills Building, San Francisco, California, Attorney for Defendants.

In the District Court of the United States for the Northern District of California, Southern Division.

IN EQUITY
No. 1826

AT LAW
No. 18342-K

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANCES MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON, JR., FRANCES MACKINNON COIT and JOHN *S.* DELANCEY, a Minor,

Defendants.

COMPLAINT

The plaintiff by its attorney, George J. Hatfield, United States District Attorney, for its cause of action alleges and says:

I.

That at all times hereinafter mentioned, the plaintiff was and now is a corporation sovereign and body politic.

II.

That this is a suit in equity of a civil nature arising under a law of Congress providing for internal revenue.

III.

That the defendant Frances Mackinnon Pusey is a citizen of the United States and an inhabitant of the State of California residing at Piedmont in said State and within the jurisdiction of this court; that the defendant George G. Mackinnon is a citizen of the United States and an inhabitant of the State of California residing at Oakland in said State and within the jurisdiction of this court; that the defendants William H. Mackinnon, Jr., and Frances Mackinnon Coit, are citizens of the United States and inhabitants of the State of California residing at Piedmont in said State and within the jurisdiction [1] of this court; that the defendant John S. Delancey, guardian of June Mackinnon Delancey, a minor and heir at law of the decedent, William H. Mackinnon, is a citizen of the United States and an

inhabitant of the State of California residing at Oakland in said State and within the jurisdiction of this court.

IV.

That on or about the 16th day of January, 1921, William H. Mackinnon, being then a resident of Piedmont in the said State of California, died in said Piedmont intestate, seized and possessed of real and personal property, tangible and intangible, and that all of said property was situated in the United States of America and within the jurisdiction of this court.

V.

That thereafter, the defendants, George G. Mackinnon and William H. Mackinnon, Jr., were duly appointed administrators of the estate of the decedent, William H. Mackinnon, in the Superior Court for the County of Alameda in said State of California, and being so appointed duly qualified as such administrators and acted as such until their discharge on September 8, 1923.

VI.

That pursuant to the provisions of an Act of Congress entitled "An Act to provide revenue, and for other purposes," approved February 24, 1919 (40 Stat. 1057) and hereinafter referred to as the Revenue Act of 1918 and to the regulations duly promulgated by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, the defendants, George G. Mackinnon and William

H. Mackinnon, Jr., as administrators of the estate of the decedent, William H. [2] Mackinnon, on or about the 15th day of February, 1922, filed with the Collector of Internal Revenue for the First District of California a return for estate tax purposes which purported to set forth:

(a) The value of the decedent's gross estate situated in the United States.

(b) The deductions allowed under Section 403 of the Revenue Act of 1918.

(c) The value of the net estate of the decedent as defined in section 403 of the Revenue Act of 1918, and

(d) The tax paid or payable thereon.

That of the amount of the estate tax due as disclosed by the said return, $10,245.17, $2,183.89 was duly paid on the second day of March, 1922, and the balance, $8,061.28, was duly paid on the fourth day of March, 1922, by the defendants George G. Mackinnon and William H. Mackinnon Jr., as administrators, to the Collecter of Internal Revenue for the First District of California.

VII.

That the aforesaid return was incorrect, misleading and false in the following particulars, to-wit:

(a) In the said return the said administrators set forth that the decedent's gross estate within the United States was $441,706.72, whereas in truth and in fact the gross estate was $514,632.02.

(b) In the said return real estate was valued at

$27,250, whereas in truth and in fact the value of said real estate was $30,330.

(c) In the said return stocks and bonds were valued at $30,018, whereas in truth and in fact the value of said stocks and bonds was $30,002.45.

(d) In the said return mortgages, notes, cash and insurance were valued at $49,365.66, whereas in truth and in fact the value of said mortgages, notes, cash and insurance [3] was $56,676.06.

(e) In the said return other miscellaneous property was valued at $5,696.80, whereas in truth and in fact the value of said other miscellaneous property was $9,654.58.

(f) In the said return the said administrators reported as a deduction on account of administrator's fee $1,988.70, whereas in truth and in fact the deduction allowable on account of administrator's fee was $2,988.70.

(g) In the said return the said administrator reported as a deduction on account of attorney's fee $1,988.70, whereas in truth and in fact the deduction allowable on account of attorney's fee is $2,788.70.

(h) In the said return the said administrators reported as a deduction on account of miscellaneous administration expenses $1338.27, whereas in truth and in fact the deduction allowable on account of miscellaneous administration expenses is $1804.93.

(i) In the said return the said administrators reported as a deduction on account of debts of the decedent $9679.92, whereas in truth and in fact the deduction allowable on account of debts of the decedent is $10,054.82.

(j) In the said return the said administrators re-

ported as a deduction on account of tax liens $5433.15, whereas in truth and in fact no deduction is allowable on account of said tax liens.

(k) In the said return the said administrators reported as a deduction on account of support of dependents $400, whereas in truth and in fact no deduction is allowable on account of support of dependents.

VIII.

That subsequent to the filing of said return the Commissioner of Internal Revenue, upon additional information [4] and facts submitted to him, directed a review and audit to be made of the return of the estate of the decedent and as a result of such review and audit the net estate and tax thereon were found and determined to be as follows:

Gross estate	$514,632.02	
Deductions	68,135.78	
Net estate for tax	$446,496.24	
Estate tax		$13,359.85
Estate tax paid		10,245.17
Additional estate tax due		$ 3,114.68

That the defendants George G. Mackinnon and William H. Mackinnon, Jr., as administrators, duly paid the said additional estate tax due in the amount of $3,114.68 to the Collector of Internal Revenue for the First District of California on April 10, 1923.

IX.

That thereafter the defendants George G. Mackinnon as administrator of the estate of the decedent, William H. Mackinnon, on or about the 31st day of October, 1923, filed with the Collector of Internal Revenue for the First District of California a claim for refund of estate taxes in the amount of $9,899.94 on the ground, among others, that only one-half of the community property of the decedent and his wife should be included in the decedent's gross estate.

X.

That thereafter the Commissioner of Internal Revenue directed a further review and audit to be made of the return of the estate of the decedent and as a result of such review and audit the said Commissioner of Internal Revenue conceded the contention of the defendant, George G. Mackinnon, that only one-half of the community property of the decedent and his wife should be included in the gross estate and as a result of such review and audit the said Commissioner of [5] Internal Revenue redetermined the net estate and taxes thereon as follows:

Gross estate as determined on review		$514,632.02
Decedent's one-half community interest		$257,316.01
Deductions exclusive of specific exemption	$18,135.78	
Additional deductions claimed by the estate	1,750.00	

Total deductions exclusive of the specific exemption	19,885.78	
One-half of the amount thereof to be borne by the decedent's gross estate	9,942.89	
Plus specific exemption	50,000.00	
Total allowable deductions		59,942.89
Net estate		197,373.12
Tax due thereon		3,921.19
Tax paid March 2, 1922	$ 2,183.89	
Tax paid March 4, 1922	8,061.28	
Tax paid April 10, 1923	3,114.68	
Total tax paid	$13,359.85	
Less tax due as herein determined	3,921.19	
Excess payment		$ 9,438.66

That the Commissioner of Internal Revenue thereafter, on October 19, 1925, allowed said claim for refund in the amount of $9,438.66; that interest was allowed in the amount of $1,848.44 from the actual dates of payment to October 19, 1925, the date of allowance of said claim for refund, or a total amount of $11,287.10; that thereafter on the 2nd day of November, 1925, a check for $5,643.55 was mailed to the defendant, Frances Mackinnon Pusey, then Frances Mackinnon, as heir at law of the decedent, William H. Mackinnon, and on the same day a check for $1,410.89 was mailed to the defendant George H.

Mackinnon as heir at law of the decedent, William H. Mackinnon, and on the same day a check for $1,410.89 was mailed to the defendant William H. Mackinnon, Jr., as heir at law of the decedent, and on the same day a check for $1,410.89 was mailed to the defendant Frances Mackinnon Coit [6] as heir at law of the decedent and on the same day a check for $1,410.88 was mailed to the defendant John S. Delancey as guardian for June Mackinnon Delancey, heir at law of the decedent, William H. Mackinnon.

XII.

That thereafter as a result of the decision of the Supreme Court of the United States in the case of *United States* vs. *Robbins,* 269 U. S. 315, it appears that said refunds were erroneous; that there should be included in the gross estate of the decedent the entire value of the community property of the decedent and his wife.

XIII.

The said sums were erroneously refunded in the total amount of $11,217.10 to the defendants by the Commissioner of Internal Revenue and that the estate tax liability is now redetermined by the said Commissioner as follows:

Gross estate	$514,632.02	
Correct amount of tax		$13,289.85
Return tax paid	10,245.17	
Additional tax assessed and paid	3,114.68	

Total assessed	13,359.85	
Tax refunded	9,438.66	
Int. refunded	1,848.44	
Total tax refunded	11,287.10	
Tax discharged		2,072.75
Estate tax liability		$11,217.10

XIV.

That the defendants have been duly notified that the amount of the aforesaid estate tax is due, but that they have wholly neglected and refused and still refuse to pay the said sum or any part thereof; that payment has been duly demanded [7] and that no part of the balance of the aforesaid Federal estate tax in the sum of $11,217.10 has been paid by the defendants or by anyone else; that the tax liability has not been discharged.

XV.

That the plaintiff is informed and believes and, therefore avers that the defendants Frances Mackinnon, George Mackinnon, William H. Mackinnon and Frances Mackinnon Coit and John S. Delancey as guardian for June Mackinnon Delancey, a minor and heir at law of the decedent, William H. Mackinnon, have in their possession real and personal property, a portion of the gross estate of the decedent, William H. Mackinnon, which they took as distributees of said estate, in excess of the tax lia-

bility now due and unpaid and that said property is within the jurisdiction of this court.

XVI.

That there is due and unpaid from the defendants to the plaintiff the sum of $11,217.10, together with interest thereon at the rate of six per cent from January 16, 1922, to the date of payment.

XVII.

That under the provisions of Section 409 of the Revenue Act of 1918, the aforesaid tax and interest thereon became at the time of the decedent's death, and is a lien upon the decedent's gross estate, including the aforesaid property now in the possession of the defendants; that said lien is valid and subsisting, and has not been released as to any or all of the aforesaid property; that said property is now situated and found within the United States and within the jurisdiction of this court.

XVIII.

That notice of said lien was recorded with the Clerk [8] of this Honorable Court and with the Register of Deeds for the County of Alameda in said State of California, and copies of said notice were served upon the defendants before the filing of this complaint.

XIX.

That thereafter due notice of said tax and demand for the payment thereof was made upon the defendants, but that said defendants failed and refused and still refuse to pay said tax or any part thereof.

XX.

That the plaintiff has no adequate remedy at law for the enforcement of its lien and the collection of said estate taxes against the estate of the decedent, William H. Mackinnon, or the defendants herein.

XXI.

That the Commissioner of Internal Revenue authorizes and sanctions these proceedings.

WHEREFORE, the plaintiff being without a clear, adequate and complete remedy at law comes before this court and prays:

1. That this Honorable Court order, adjudge and decree that there is due and owing to the United States from the estate of William H. Mackinnon, additional Federal estate taxes in the sum of $11,217.10.

2. That this Honorable Court order, adjudge and decree that the gross estate of the decedent, William H. Mackinnon, hereinabove set forth and now in the hands of the defendants, is subject to a lien and constitutes a trust fund for the payment of the Federal estate tax due and owing by the said estate to the plaintiff, and that the defendants and each of them be enjoined from disposing of any moneys or other property, real or personal, which formed a portion of the gross estate of the decedent, William H. Mackinnon, which are [9] now in their possession; that the court further order, adjudge and decree that unless the Federal estate tax and interest due the plaintiff, together with the costs of this proceeding, shall on or before a certain day be paid, such portion of the gross estate of the decedent, William H. Mackinnon, as

remains in the hands of the defendants be applied to the satisfaction of the aforesaid estate taxes, interest and costs.

3. That a restraining order or injunction be issued pending the final hearing and decree of this court, whereby the defendants, and each of them be restrained and enjoined from transferring or otherwise disposing of any portion of the gross estate of the decedent, William H. Mackinnon, now in their possession.

4. That the plaintiff may have such other and further relief as the case may require and equity may entitle it to.

5. And the plaintiff prays that due process of subpoena issue out of and under the seal of this Honorable Court directed to the above-named defendants and commanding them on a day certain and under certain penalties therein expressed personally to appear before this court then and there to answer all and singularly and to stand to and perform and abide such orders, directions and decrees as may be made against them in the premises.

GEO. J. HATFIELD,
United States Attorney.

Northern District of California, Southern Division.
Attorney for Plaintiff.

[Endorsed]: Filed January 14, 1927.

WALTER B. MALING,
Clerk.

By Harry L. Fouts,
Deputy Clerk. [10]

[Title of Court and Cause.]

NOTICE OF MOTION TO QUASH.

To Plaintiff, UNITED STATES OF AMERICA and its attorney, GEORGE J. HATFIELD.

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that on Monday, the 21st day of February, 1927, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, in the Court Room of the above entitled Court, before the Honorable Judge sitting in Equity, the defendants herein, and each of them, specially appearing by and through their solicitor, Carey Van Fleet, will move to quash service of the subpoena ad respondendum as more fully appears in the annexed motion.

CAREY VAN FLEET,
Solicitor for defendants
specially appearing.

[Title of Court and Cause.]

MOTION TO QUASH.

Now come the defendants in the above entitled action, and each of them, specially appearing by and through their solicitor, Carey Van Fleet, and move to quash the purported service upon them, of that certain subpoena issued in the above entitled cause on the 14th day of January, 1927, upon the ground for the reason that no service was made under Equity

Rule 13 upon said defendants, or either of them, and that no bona fide attempt was made to serve said defendants, or either of them, under Equity Rule 13 or any other rule or process of this court and said defendants deny, and each of them denies, that any legal service was made upon them, [11] or either of them, nor have said defendants, or either of them, accepted service herein, nor have said defendants or either of them voluntarily appeared, and have said defendants, or either of them, waived due service upon them or either of them.

Said defendants state that their appearance herein, and the appearance of each of them, is special, and that if the purpose for which said appearance is made be not sustained by the court, they will appear generally in the cause within the time allowed therefor by law, or order of the court, or stipulation of the opposite party. Said motion will be made upon all the papers and records in the above entitled proceeding, the return of the Marshall and the affidavits of William H. Mackinnon, Jr., and John S. Delancey.

CAREY VAN FLEET,
Solicitor for defendants
specially appearing.

Service and receipt of a copy of the within Notice and Motion to Quash is hereby admitted this 16th day of February, 1927.

GEO. J. HATFIELD,
K.
Attorney for Plaintiff.

[Endorsed]: February 16, 1927.

WALTER B. MALING,
Clerk.
By Harry F. Fouts,
Deputy Clerk. [12]

[Title of Court and Cause.]

(AFFIDAVIT OF JOHN S. DELANCY)

State of California,
County of Alameda,—ss.

JOHN S. DE LANCEY, being first duly sworn, deposes and says: That he is the guardian of JUNE MACKINNON DE LANCEY, a minor and one of the defendants named in the above entitled matter; that service of the subpoena ad Respondendum of Date the 14th day of January, 1927, and of our independence the 151st in the above entitled matter, was made by delivering the same at the office of affiant during affiant's absence and at no time was said subpoena served personally upon affiant, although your affiant was at his office a considerable portion of the day when said subpoena was left as aforesaid and was at his home and in his office at various times during said day and every day thereafter.

JOHN S. DELANCEY.

Subscribed and sworn to before me this 16th day of February, 1927.

(Seal) R. H. CONDIE,

Notary Public in and for the County of Alameda, State of California.

Service and receipt of a copy of the within Affidavit is hereby admitted this 16th day of February, 1927.

GEO. H. HATFIELD,
K.
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 16, 1927.

WALTER B. MALING,
Clerk. [13]

[Title of Court and Cause.]

AFFIDAVIT OF WILLIAM H. MACKINNON, JR., FOR USE ON MOTION TO QUASH AND MOTION TO DISMISS

State of California,
City and County of
San Francisco—ss.

WILLIAM H. MACKINNON, JR., being duly sworn, deposes and says:

That he is mentioned as one of the defendants in the above entitled action. That he is William H. Mackinnon, Jr., mentioned in the complaint in the above entitled action, who is the Administrator of the Estate of William H. Mackinnon, deceased.

That he lives at 236 Lakeshore Boulevard, in the City of Oakland, County of Alameda, State of California. That on the 15th day of January, 1927, he was at home at his said residence at about ten o'clock

in the morning of said day. That at said time a man called up his residence and the said affiant talked to the said man over the telephone and the said man said he was calling up from the office of said affiant at 2218 San Pablo Avenue, City of Oakland, County of Alameda, State of California. That he understood said man to say that he was from Marsh & McLennan, Insurance Brokers, with whom said affiant had pending business and said man told him that he had some papers for him, said affiant. Said affiant asked him what the papers consisted of. Said man evaded the question and did not tell him what the papers were. Said man asked him when he was coming to the office. Said affiant told him that he did not know when he would be at his office and if he had any papers to leave them at his office. Said affiant did not get to his office until the following Monday, January 17th, 1927. There he found four (4) subpoenas on his [14] desk, purporting to have been issued on the 14th day of January, 1927, entitled in the above entitled cause, copy of which is hereunto annexed and marked Exhibit "A". That said affiant was not expecting said subpoenas, knew nothing of the filing of the above entitled action and the first intimation of the filing of the above entitled action came to him when he found the four (4) subpoenas on his desk. Affiant did not know that any United States Marshall or other officer was seeking him and does not now know any more about the circumstances of the case than as already related here, and as related to him by one G. F. Hatches, who was in the office when some man came in on the 15th day of January, 1927, at the hour

of ten o'clock A. M. or thereabouts and asked said Hatches where he could communicate with said affiant. Upon communicating by telephone, as aforesaid, with said affiant, he left said papers on affiant's desk. The said G. F. Hatches is not a partner of said affiant, not associated with him in any way, but said G. P. Hatches has a key to affiant's office for his convenience at times.

Affiant further states that his mother, Mrs. Frances Mackinnon Pusey, mentioned as one of the defendants in this case, lives at Magnolia and Nova Drive in Piedmont, County of Alameda, State of California, where she has a large and well-known place.

That his said mother, Frances Mackinnon Pusey, was at home on the 15th day of January, 1927, and available and has not left her home since said date. That Frances Mackinnon Coit, affiant's sister, mentioned as one of the defendants in the above entitled action, lives at 82 Fairview Avenue, Piedmont, County of Alameda, State of California, and, as your affiant knows, was at home on the 15th day of January, 1927, [15] and has been at home ever since said date. That George G. Mackinnon, affiant's brother, mentioned as one of the defendants in the above entitled action, lives at 176 Perkins Street, City of Oakland, County of Alameda, State of California, and was at home with his wife, as your affiant knows, on said 15th day of January, 1927. That said George G. Mackinnon has been home ever since that time by reason that his wife has been sick for the last four (4) weeks. When your affiant says that each of the above parties was at home, he means that they were each in and about

their respective homes and available thereto on the dates mentioned.

Further, affiant sayeth not.

WILLIAM H. MACKINNON, JR.

Subscribed and sworn to before me this 15th day of February, 1927.

(Seal) JEFFERSON E. PEIPER,
Notary Public in and for the City and County of San Francisco, State of California. [16]

"EXHIBIT A"

UNITED STATES OF AMERICA

In the Southern Division of the United States District Court, Northern District of California, Third Division.

IN EQUITY

THE PRESIDENT OF THE UNITED STATES OF AMERICA, GREETING: To FRANCES MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON, JR., FRANCES MACKINNON COIT and JOHN S. DELANCEY, Guardian of JUNE MACKINNON DELANCY, a Minor.

YOU ARE HEREBY COMMANDED, That you be and appear in the Southern Division of the United States District Court for the Northern District of California, Third Division, aforesaid, at the Court

Room in the City of San Francisco, twenty days from the date hereof, to answer a Bill of Complaint exhibited against you in said Court by UNITED STATES OF AMERICA, Who citizen of the ———— and to do and receive what the said Court shall have considered in that behalf.

WITNESS, the HONORABLE FRANK H. KERRIGAN, Judge of said District Court, this 14th day of January, in the year of our Lord one thousand nine hundred and twenty-seven and of our Independence the 151st.

(Seal) WALTER B. MALING,
Clerk.

By A. C. Aurich,
Deputy Clerk. [17]

MEMORANDUM PURSUANT TO RULE 12, RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES.

YOU ARE HEREBY REQUIRED to file your answer or other defense in the above suit, on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the Clerk's Office of said Court, pursuant to said Bill: otherwise the said Bill may be taken pro confesso.

WALTER B. MALING,
Clerk.

By A. C. Aurich,
Deputy Clerk.

Service and receipt of a copy of the within Affi-

davit is hereby admitted this 16th day of February, 1927.

GEORGE J. HATFIELD,
K.
Attorney for Plaintiff.

[Endorsed]: Filed February 16, 1927.

WALTER B. MALING,
Clerk. [18]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 21st day of February, in the year of our Lord one thousand nine hundred and twenty-seven.

PRESENT: the Honorable Frank H. Kerrigan.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANCIS MACKINNON PUSEY, et al.,
Defendants.

After argument it is ordered that the motion to quash service on the calendar this day in the above entitled case, be and the same is hereby granted. [19]

[Title of Court and Cause.]

NOTICE OF MOTION TO DISMISS

To Plaintiff, UNITED STATES OF AMERICA, and its attorney, GEORGE J. HATFIELD.

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that on Monday, the 7th day of March, 1927, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard at the courtroom of the above entitled court before the Honorable Judge sitting in Equity, defendants herein and each of them, by and through their solicitor, Carey Van Fleet, will move to dismiss the complaint or bill in equity as more fully appears in the annexed motion.

CAREY VAN FLEET,
Solicitor for Defendants.

Service and receipt of a copy of the within Motion to Dismiss is hereby admitted this 1st day of March, 1927.

GEORGE J. HATFIELD,
Attorney for Plaintiff.

[Endorsed]: Filed March 2, 1927.

WALTER B. MALING,
Clerk. [20]

[Title of Court and Cause.]

MOTION TO DISMISS.

Now come the defendants in the above entitled action and each of them appearing by and through their solicitor, Carey Van Fleet, and move to dismiss the bill in equity in the above entitled action upon the grounds and for the reasons:

I.

That it appears on the face of the bill and the record in this case that all proceedings for the collection of the tax set forth in said bill were barred by Section 1320 of the Revenue Act of 1921, as the government did not begin this proceeding within five (5) years after the date when said tax was due and within six (6) years after the death of the decedent.

II.

That the statute was not tolled by the issuance of process in the above entitled action on the 26th day of January, 1927, and the service thereof on the 28th day of January, 1927. In this behalf, the date of commencement of the above entitled action was postponed to the date of this service of process, which was after the statute of limitations had run.

III.

That in order to toll the statute there must be a delivery of the writ followed either by a service of the same or a bonafide effort to serve it.

IV.

The above entitled action is barred by Section 310 of the Revenue Act of 1926, which cuts down the period of the statute of limitations to three (3) years after the [21] return is filed.

Said motion will be made upon the papers and records in the above entitled proceeding and upon the affidavits of William H. Mackinnon, Jr., and John S. Delancey used in the motion to quash.

CAREY VAN FLEET,
Solicitor for Defendants.

Service and receipt of a copy of the within Motion to Dismiss is hereby admitted this 1st day of March, 1927.

GEO. J. HATFIELD,
Attorney for Plaintiff.

[Endorsed]: Filed March 2, 1927.
WALTER B. MALING,
Clerk. [22]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 12th day of April, in the year of our Lord one thousand nine hundred and twenty-seven.

PRESENT: the Honorable A. F. ST. SURE, District Judge.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANCES MACKINNON PUSEY, et al.,

Defendants.

Defendant's motion to dismiss heretofore argued and submitted, being now fully considered, it is ordered that said motion be and the same is hereby denied. [23]

District Court of the United States, Northern District of California, Third Division. In Equity.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To FRANCES MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON, JR., FRANCES MACKINNON COIT, and JOHN S. DELANCEY, Guardian of JUNE MACKINNON DELANCEY, a Minor, Greeting:

YOU ARE HEREBY COMMANDED, That you be and appear in the Southern Division of the United States District Court for the Northern District of California, Third Division, aforesaid, at the Court Room in the City of San Francisco, twenty days from the date hereof, to answer a Bill of Complaint exhibited against you in said Court by UNITED STATES OF AMERICA, and to do

and receive what the said Court shall have considered in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, Judge of Said District Court, this 14th day of January, in the year of our Lord one thousand nine hundred and twenty-six and of our Independence the 151st.

[Seal]

WALTER B. MALING,
Clerk.

By A. C. Aurich (Sgd),
Deputy Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice for the Courts of Equity of the United States:

YOU ARE HEREBY REQUIRED to file your answer or other defense in the above suit on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the Clerk's Office of said Court, pursuant to said Bill; otherwise the said Bill may be taken *pro confesso.*

WALTER B. MALING,
Clerk.

By A. C. Aurich (Sgd),
Deputy Clerk.

RETURN ON SERVICE WRIT.

United States of America,
Northern District of California—ss.

I hereby certify and return that I served the an-

nexed Subpoena and Equity on the therein-named John S. DeLancey, Guardian of June Mackinnon De Lancey, a Minor, by handing to and leaving a true and correct copy thereof with Miss Mary Eissle, Steno for John S. Delancey personally at Oakland, Calif., in said District on the 15th day of Jan., A. D. 1927.

FRED ESOLA,
U. S. Marshal.

By E. H. Gibson,
Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California—ss.

I hereby certify and return that I served the annexed Subpoena and Equity on the therein-named FRANCIS MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON JR., FRANCES MACKINNON COIT by handing to and leaving a true and correct copy thereof with G. F. HATCHES, Partner of Wm. H. Mackinnon Jr., personally at Oakland, Calif., in said District on the 15th day of Jan., A. D. 1927.

FRED ESOLA,
U. S. Marshal.

By E. H. Gibson,
Deputy.

[Endorsed]: Filed Jan. 15, 1927.

WALTER B. MALING,
Clerk.
By Harry L. Fouts,
Deputy Clerk. [24]

District Court of the United States, Northern District of California, Third Division. In Equity.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To FRANCES MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON, JR., FRANCES MACKINNON COIT, and JOHN S. DELANCY, Guardian of JUNE MACKINNON DELANCEY, a, Minor, Greeting:

YOU ARE HEREBY AS YOU HAVE HERETOFORE BEEN COMMANDED, That you be and appear in the Southern Division of the United States District Court for the Northern District of California, Third Division, aforesaid, at the Court Room in the City of San Francisco, twenty days from the date hereof, to answer a Bill of Complaint exhibited against you in said Court by UNITED STATES OF AMERICA and to do and receive what the said Court shall have considered in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, Judge of said District Court, this 26th day of January in the year of our Lord one thousand nine

hundred and twenty-seven and of our Independence the 151st.

(Seal) WALTER B. MALING,
Clerk.

By A. C. Aurich,
Deputy Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice for the Courts of Equity of the United States

YOU ARE HEREBY REQUIRED to file your answer or other defense in the above suit on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the Clerk's Office of said Court, pursuant to said Bill; otherwise the said Bill may be taken *pro confesso.*

WALTER B. MALING,
Clerk.

By A. C. Aurich,
Deputy Clerk.

RETURN ON SERVICE WRIT.

United States of America,
Northern District of California—ss.

I hereby certify and return that I served the annexed Subpoena ad Respondendum on the therein-named JOHN S. DELANCEY GUARDIAN OF JUNE MACKINNON DELANCEY (A Minor) by handing to and leaving a true and correct copy thereof with said John S. Delancey as the Guardian of June

Mackinnon Delancey a minor personally at Oakland in said District on the 28th day of January, A. D. 1927.

FRED L. ESOLA,
U. S. Marshal.

By Geo. H. Burnham,
Deputy.

RETURN ON SERVICE WRIT.

United States of America,
Northern District of California—ss.

I hereby certify and return that I served the annexed Subpoena ad Respondendum on the therein-named FRANCES MACKINNON PUSEY; WILLIAM H. MACKINNON JR., FRANCES MACKINNON COIT by handing to and leaving a true and correct copy thereof with each of said Francis Mackinnon Pussey, William H. Mackinnon Jr., and Frances Mackinnon Coit personally at Oakland in said District on the 28th day of January, A. D. 1927.

FRED L. ESOLA,
U. S. Marshal.

By Geo. H. Burnham,
Deputy.

United States Marshal's Office,
Northern District of California.

I hereby certify and return, that I received the within writ on the 27th day of January, 1927, and personally served the same on the 28th day of Jan-

uary, 1927, on George G. Mackinnon by delivering to and leaving with May Ruth Mackinnon an adult person, who is a member or resident in the family of George G. Mackinnon (towit the wife of said George G. Mackinnon) one of said defendants named therein, at Oakland, County of Alameda, in said District, a copy thereof, at the dwelling house or usual place of abode of said George G. Mackinnon (176 Perkins St.) one of said defendants herein.

FRED L. ESOLA,
U. S. Marshal.

By Geo. H. Burnham,
Deputy.

Dated at San Francisco, Cal. January 28th, 1927.
[Endorsed]: Filed Jan. 28, 1927.

WALTER B. MALING,
Clerk.

By Harry L. Fouts,
Deputy Clerk. [25]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 13th day of February, in the year of our Lord one thousand nine hundred and twenty-nine.

PRESENT: the Honorable FRANK H. KERRIGAN, District Judge.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANCES MACKINNON PUSEY, et al.,

Defendants.

Ordered that the order heretofore submitting the issues herein be and the eame is hereby vacated and set aside, and that this case be and it is hereby transferred to the law side of this Court. [26]

[Title of Court and Cause.]

AMENDED COMPLAINT.

The plaintiff by its attorney, Geo. J. Hatfield, United States Attorney for the Northern District of California, for its cause of action alleges and says:

I.

That at all times hereinafter mentioned, the plaintiff was and now is a corporation sovereign and body politic.

II.

That the defendant Frances Mackinnon Pusey is a citizen of the United States and an inhabitant of the State of California, residing at Piedmont in said State, and within the jurisdiction of this court; that the defendant George G. Mackinnon is a citizen of the United States and an inhabitant of the State of

California residing at Oakland in said State and within the jurisdiction of this [27] court; that the defendants William H. Mackinnon, Jr., and Frances Mackinnon Coit, are citizens of the United States and inhabitants of the State of California, residing at Piedmont in said State and within the jurisdiction of this court; that the defendant John S. Delancey, guardian of June Mackinnon Delancey, a minor and heir at law of the decedent, William H. Mackinnon, is a citizen of the United States and an inhabitant of the State of California residing at Oakland in said State and within the jurisdiction of this court.

III.

That on or about the 16th day of January, 1921, William H. Mackinnon, being then a resident of Piedmont, in the said State of California, died in said Piedmont intestate, seized and possessed of real and personal property, tangible and intangible, and that all of said property was situated in the United States of America and within the jurisdiction of this court.

IV.

That thereafter, the defendants George G. Mackinnon and William H. Mackinnon, Jr., were duly appointed administrators of the estate of the decedent, William H. Mackinnon in the Superior Court for the County of Alameda in said State of California, and being so appointed duly qualified as such administrators and acted as such until their discharge on September 8, 1923.

V.

That pursuant to the provisions of an Act of Congress entitled "An Act to provide Revenue, and for other purposes," approved February 24, 1919, (40 Stat. 1057) and hereinafter referred to as the Revenue Act of 1918, and to [28] the regulations duly promulgated by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, the defendants George G. Mackinnon and William H. Mackinnon, Jr., as administrators of the estate of the decedent, William H. Mackinnon, on or about the 15th day of February, 1922, filed with the Collector of Internal Revenue for the first district of California, a return for estate tax purposes which purported to set forth:

(a) The value of the decedent's gross estate situated in the United States;

(b) The deductions allowed under Section 403 of the Revenue Act of 1918;

(c) The value of the net estate of the decedent as defined in Section 403 of the Revenue Act of 1918, and

(d) The tax paid or payable thereon.

That of the amount of the estate tax due as disclosed by the said return, $10,245.17, $2,183.89 was duly paid on the second day of March, 1922, and the balance $8,061.28, was duly paid on the fourth day of March, 1922, by the defendants George G. Mackinnon and William H. Mackinnon, Jr., as administrators, to the Collector of Internal Revenue for the First District of California.

VI.

That the aforesaid return was incorrect, misleading and false in the following particulars, to-wit:

(a) In the said return the said administrators set forth that the decedent's gross estate within the United States was $441,706.72, whereas in truth and in fact the gross estate was $514,632.02.

(b) In the said return real estate was valued at $27,250.00, whereas in truth and in fact the value of said real estate was $30,330.00. [29]

(c) In the said return stocks and bonds were valued at $30,018.00 whereas in truth and in fact the value of said stocks and bonds was $30,002.45.

(d) In the said return mortgages, notes, cash and insurance were valued at $49,365.66, whereas in truth and in fact the value of said mortgages, notes, cash and insurance was $56,676.06.

(e) In the said return other miscellaneous property was valued at $5696.80, whereas in truth and in fact the value of said other miscellaneous property was $9654.58.

(f) In the said return the said administrators reported as a deduction on account of administrator's fee $1988.70, whereas in truth and in fact the deduction allowable on account of administrator's fee was $2988.70.

(g) In the said return the said administrator reported as a deduction on account of attorney's fee $1988.70, whereas in truth and in fact the deduction allowable on account of attorney's fee is $2788.70.

(h) In the said return the said administrator reported as a deduction on account of miscellaneous

administration expenses $1338.27, whereas in truth and in fact the deduction allowable on account of miscellaneous administration expenses is $1804.93.

(i) In the said return the said administrators reported as a deduction on account of debts of the decedent $9679.92, whereas in truth and in fact the deduction allowable on account of debts of the decedent is $10,054.82.

(j) In the said return the said administrators reported as a deduction on account of tax liens $5433.15, whereas in truth and in fact no deduction is allowable on account of said tax liens.

(k) In the said return the said administrators reported as a deduction on account of support of dependents $400, whereas in truth and in fact no deduction is allowable on account of support of dependents.

VII.

That subsequent to the filing of said return the Commissioner of Internal Revenue, upon additional information and facts submitted to him, directed a review and audit to be made of the return of the estate of the de- [30] cedent and as a result of such review and audit the net estate and tax thereon were found and determined to be as follows:

Gross estate	$514,632.02	
Deductions	68.135.78	
Net estate for Tax	$446,496.24	
Estate tax		$13,359.85
Estate tax paid		10,245.17
Additional estate tax due		$ 3,114.68

That the defendants George G. Mackinnon and William H. Mackinnon, Jr., as administrators, duly paid the said additional estate tax due in the amount of $3114.68 to the Collector of Internal Revenue for the First District of California on April 10, 1923.

VIII.

That thereafter the defendant George G. Mackinnon as administrator of the estate of the decedent, William H. Mackinnon, on or about the 31st day of October, 1923, filed with the Collector of Internal Revenue for the First District of California a claim for refund of estate taxes in the amount of $9899.94 on the ground, among others, that only one-half of the community property of the decedent and his wife should be included in the decedent's gross estate.

IX.

That thereafter the Commissioner of Internal Revenue directed a further review and audit to be made of the return of the estate of the decedent and as a result of such review and audit the said Commissioner of Internal Revenue conceded the contention of the defendant, George G. Mackinnon, that only one-half of the community property of the decedent and his wife should be included in the gross [31] estate and as a result of such review and audit the said Commissioner of Internal Revenue redetermined the net estate and taxes thereon as follows:

Gross estate as determined
on review $514,632.02

Decedent's one-half community interest		$257,316.01
Deductions exclusive of specific exemption	18,135.78	
Additional deductions claimed by the estate	1,750.00	
Total deductions exclusive of specific exemption	19,985.78	
One-half of the amount thereof to be borne by the decedent's gross estate	9,942.89	
Plus specific exemption	50,000.00	
Total allowable deductions		59,942.89
Net estate		$197,373.12
Tax due thereon		3,921.19
Tax paid March 2, 1922	$ 2,183.89	
Tax paid March 4, 1922	8,061.28	
Tax paid April 10, 1923	3,114.68	
	$13,359.85	
Less tax due as herein determined	3,921.19	
Excess payment		9,438.66

X.

That the Commissioner of Internal Revenue thereafter, on October 19, 1925, allowed said claim for refund in the amount of $9,438.66; that interest was allowed in the amount of $1,848.44 from the actual

dates of payment to October 19, 1925, the date of allowance of said claim for refund, or a total amount of $11,287.10; that thereafter on the 2nd day of November, 1925, a check for $5,643.55 was mailed to the defendant Frances Mackinnon Pusey, then Frances Mackinnon, as heir at law of the decedent, William H. Mackinnon, and on the same day a check for $1,410.89 was [32] mailed to the defendant George H. Mackinnon as heir at law of the decedent, William H. Mackinnon and on the same day a check for $1,410.89 was mailed to the defendant William H. Mackinnon, Jr., as heir at law of the decedent, and on the same day a check for $1,410.89 was mailed to the defendant Frances Mackinnon Coit as heir at law of the decedent, and on the same day a check for $1,410.89 was mailed to the defendant John S. Delancey as guardian for June Mackinnon Delancey, heir at law of the decedent, William H. Mackinnon.

XI.

That thereafter as a result of the decision of the Supreme Court of the United States in the case of *United States* vs. *Robbins,* 269 U. S. 315, it appears that said refunds were erroneous; that there should be included in the gross estate of the decedent the entire value of the community property of the decedent and his wife.

XII.

That there is due and unpaid from the defendants to the plaintiff the sum of $11,217.10, together with interest thereon at the rate of seven per cent from

January 16, 1922, to the date of payment; that no part of said sum has ever been paid by defendants to plaintiff although demand therefor has often been made.

XIII.

That heretofore, to-wit, on or about the 2nd day of November, 1925, the defendants became indebted to plaintiff in the sum of $11,287.10 for money had and received to the use of plaintiff. That no part of said sum has ever been paid by defendants, or either, or any of them, to plaintiff although demand therefor has often been made.

WHEREFORE, plaintiff prays that it have judgment [33] against defendants for the sum of $11,-287.10, together with interest thereon at the rate of seven per cent per annum from the 2nd day of November, 1925, and for costs of suit.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Plaintiff.

Service of the within Amended Complaint by copy admitted this 22nd day of August, 1929.

CAREY VAN FLEET,
Per F. Hall,
Attorney for Certain Defendants.

[Endorsed]: Filed, August 22, 1929.

WALTER B. MALING,
Clerk.
By Harry L. Fouts,
Deputy Clerk. [34]

[Title of Court and Cause.]

AMENDED ANSWER.

Now come the defendants by their attorney, Carey Van Fleet, and not waiving any of the defenses heretofore interposed in their answer to plaintiff's original complaint, and not waiving any of their objections to the order of the Court transferring this cause from the equity side to the law side of the Court, and not waiving any of their objections to the jurisdiction of the Court to try this cause on the law side and admit, allege and deny as follows:

I.

Admit the allegations contained in Paragraphs I. II, III, IV and V of said amended complaint.

II.

Deny that the return referred to in Paragraph VI of said amended complaint was incorrent or misleading or false in any of the particulars set forth in Paragraph VI of said amended complaint, or in any particulars, or at all, and in this behalf allege; that said return was made entirely in good faith and the particulars pointed out in said Paragraph VI of said amended complaint were changes made by the Commissioner of Internal Revenue in the ordinary routine of his office.

III.

Admit the allegations contained in Paragraphs VII, VIII, IX and X of said amended complaint.

IV.

Denying the allegations of said Amended Complaint contained in Paragraph XI, defendants deny that thereafter as a result of the decision of the Supreme Court of the United [35] States in the case of U. S. vs. Robbins, 269 U. S. 315, it appears that said refunds were erroneous; deny that said refunds were erroneous; deny that there should be included in the gross estate of the decedent the entire value of the community property of the decedent and his wife.

Deny that said refunds were made by the Commissioner of Internal Revenue through any mistake of law or fact. Deny that it has ever been finally determined by the Supreme Court of the United States that said refunds were erroneous in law or fact. And in this behalf allege that under date of July 12th, 1926, the Secretary of the Treasury approved an opinion of the Attorney-General, recommending that a test case should be carried to the Supreme Court of the United States to determine the question as to whether these refunds were erroneous; allege that no such test case was ever finally determined by the Supreme Court of the United States; deny that any money is being wrongfully withheld by these defendants from the United States.

VI.

Deny that there is due or unpaid from the Defendants to the plaintiff the sum of $11,217.10, or any sum at all, or any interest upon any sum at all; deny that no part of said sum *as* ever been paid by de-

fendants to plaintiff, or that any such sum or any sum at all is owing by defendants to plaintiff.

VII.

Deny that heretofore on or about the 2nd day of November, 1925, or on any other day, or at all, the defendants became indebted to plaintiff in the sum of $11,287.10, or in any sum, or at all, for money had or received, or for any money at all to the use of plaintiff. Deny that any part of [36] said sum, or said sum, or any sum at all, is owing by defendants to plaintiff.

AND FOR FURTHER AND SEPARATE DEFENSES AND COUNTERCLAIM DEFENDANTS ALLEGE AS FOLLOWS:

I.

That the estate tax set forth in the complaint herein and which was refunded by the Treasury Department to the defendants as set forth therein was not levied upon any portion of the estate of William H. MacKinnon, deceased, passing to the distributees of said estate, but in truth and in fact was levied upon an alleged transfer of real property of the said William H. MacKinnon, deceased, to the wife of said William H. MacKinnon, deceased, now Frances Mackinnon Pusey, before the death of William H. MacKinnon, deceased, on the 13th day of December, 1920. Said transfer consisted of deeds of gift by said William H. MacKinnon, deceased, to his said wife for a valuable consideration, of real property, situate in the County of Alameda, County of Fresno, and County

of Los Angeles, State of California, executed on the 13th day of December, 1920. The value of said real property was appraised at the sum of Three Hundred Sixty Eight Thousand Three Hundred Seventy Six Dollars ($368,376.00) more or less at the time of levying said estate tax. Said deeds of gift were made in good faith and not in contemplation of death and were intended to take effect in possession and enjoyment immediately during the lifetime of the decedent.

Defendants allege that the estate tax paid upon said transfer was made through mistake of law by these defendants; that they were misguided as to their rights in making said payment of said estate tax and that the amount erroneously [37] paid by them more than off sets the claim of the government herein.

II.

That the amended complaint herein sets forth an entirely new, separate and distinct cause of action from that set forth in the original complaint herein and said new cause of action is barred by subdivision b of section 610 of the Revenue Act of 1928.

III.

That there was never any redetermination by the Commissioner of Internal Revenue after the determination set forth in Paragraphs IX and X of said amended complaint, and there was never any assessment by the Commissioner of Internal Revenue against these defendants within the time allowed by Section 1322 of the Act of 1921. That the determination of the Commissioner in allowing the claim

for refund as set forth in the amended complaint was final and conclusive.

IV.

That on or about the 24th day of February, 1923, after the defendant Frances MacKinnon Pusey had paid all the estate taxes, demanded by the United States Government, she conveyed her property to the other defendants herein by deeds outright and by a deed of trust; that said deed of trust consisted wholly of real property and was for the benefit of herself during life and upon her death to continue for the benefit of the other defendants herein; that said property contained in said deed of trust is subject to a mortgage in the sum of $67,000.00, and the income derived therefrom is not sufficient to pay the tax demanded by the Government of the United States in this action and she will be further required to mortgage the property in said deed of trust, which would require a dissolution of this deed of [38] trust and endless expensive litigation.

That she has been lulled into security by the action of the Government during these years, particularly by the refunding of the amount set forth in the amended complaint and if she is required to raise the amount now demanded by the Government she will suffer great injury to her property.

It is alleged that by reason of these facts the Government is estopped from collecting the sum of money demanded in the amended complaint and said claim is without equity or good conscience.

WHEREFORE defendants pray that plaintiff take

nothing by this action and that they be dismissed hence with their costs.

CAREY VAN FLEET,
Attorney for Defendants.

State of California,
City and County of San Francisco—ss.

Carey Van Fleet being duly sworn deposes and says: That he is the attorney of the defendants in the above entitled action; that all of said defendants are absent from the County in which he has his office and that he has knowledge of the facts stated in said amended answer; that he has read the foregoing amended answer and knows the contents thereof, and the same are true of his own knowledge except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

CAREY VAN FLEET.

Subscribed and sworn to before me this 5th day of September, 1929.

[Seal] FLORA HALL,

Notary Public in and for the City and County of San Francisco, State of California.

Due service and receipt of a copy of the within Amended Answer is hereby admitted this 5th day of September, 1929.

GEO. J. HATFIELD,
Attorney for Pltf.

[Endorsed]: Filed, Sept. 6, 1929.

WALTER B. MALING,
Clerk. [39]

[Title of Court and Cause.]

DEMURRER TO AMENDED ANSWER TO AMENDED COMPLAINT.

COMES NOW the plaintiff above named by Geo. J. Hatfield, United States Attorney for the Northern District of California, and demurs to the amended answer of defendants in the above entitled action on the following grounds:

I.

That the counterclaim set out in defendants' amended answer to the amended complaint does not state facts sufficient to constitute a counterclaim against the plaintiff or at all.

II.

That the first separate defense does not state facts sufficient to constitute a counterclaim against the plaintiff or at all. [40]

III.

That the amended answer does not state facts sufficient to constitute a defense to the cause of action set forth in plaintiff's amended complaint.

IV.

That the second separate defense on page four does not state facts sufficient to constitute a defense.

V.

That the third separate defense on page four does not state facts sufficient to constitute a defense.

VI.

That the fourth separate defense on page five does not state facts sufficient to constitute a defense.

WHEREFORE, plaintiff prays that defendants take nothing by their said counterclaim and their second, third and fourth separate defenses, but that said counterclaim and said defenses be dismissed.

GEO J. HATFIELD (Sgd),
United States Attorney.

CHELLIS M. CARPENTER (Sgd),
Assistant United States Attorney,
Attorneys for Plaintiff.

CERTIFICATE THAT THE GROUNDS OF DEMURRER ARE MERITORIOUS.

I, Chellis M. Carpenter, one of the attorneys for the above named plaintiff do hereby certify that the above demurrer to defendants' amended answer and counterclaim is not interposed for the purpose of delay and that in my opinion [41] the issues therein raised are well taken in law.

CHELLIS M. CARPENTER,
Assistant United States Attorney.

POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO AMENDED ANSWER TO AMENDED COMPLAINT.

A counterclaim is subject to demurrer on the same grounds as is an original complaint.

> Biss vs. Sneath, 119 Cal. 526;
> Herron, Rickard & Cons. vs. Wilson Lyon & Co., 4 Cal. App. 488.

Section 3226 of the Revised Statutes provides:

> "No suit or proceedings shall be maintained * * * for the return of any internal revenue tax alleged to be erroneously or illegally assessed or collected * * * until a claim for refund or *credit* has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; * * * "

It is to be noted that there is no allegation anywhere in the complaint, not to mention the counterclaim, to the effect that defendants' counterclaim was presented to the Commissioner of Internal Revenue, and therefore the counterclaim does not state facts sufficient to constitute a counterclaim.

Even prior to the enactment of the foregoing provisions of the Revised Statutes counterclaims unless first presented for payment were not permitted to be set up by the defendant in actions brought by the United States. This was by reason of [42]

Section 951 of the Revised Statutes, 28 U. S. C. 774,

which provides:

"In suits *brought by the United States* against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or by some unavoidable accident."

United States vs. Eckford, 6 Wall., 484;
United States vs. Nipissing Mines Co., 206 Fed. 431, 434.

It is plain to be seen that Congress intended by the foregoing enactments that claims against the United States be first presented to the Treasury Department, or to the Commissioner of Internal Revenue if it is a tax matter, in order that the Treasury Department or the Bureau of Internal Revenue as the case may be, may have the opportunity to either allow the claim or reject it.

Friederichsen vs. Renard, 247 U. S. 207.

The case of

> Adams vs. Jones (C.C.A. Alabama 1926), 11 Fed. (2d) 759, certiorari denied 271 U. S. 685,

holds that a transfer to the law side is not the commencing of a new suit but is merely a continuation of the original suit; and the transfer to the law side of the court may be done though a new suit would be barred by the statute of limitations.

> United States vs. Lora Pratt Kelly, 30 Fed. (2d) 193. [43]

Defendants' third separate defense has to do with objecting to matters set forth in plaintiff's amended complaint which were inserted by the plaintiff merely to show the inducement to the Treasury Department for mistakenly paying said moneys to the defendants, which allegations are at the most mere verbiage. Stripped of this verbiage the action is one strictly in common law count form for moneys had and received to the use of the plaintiff.

> United States vs. Lora Pratt Kelly, 30 Fed. (2d) 193.

Receipt of the within Demurrer by copy admitted this 7th day of September, 1929.

CAREY VAN FLEET,
Attorney for.....

[Endorsed]: Filed Sept. 7, 1929. [44]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 3rd day of October, in the year of our Lord one thousand nine hundred and twenty-nine.

PRESENT: the Honorable FRANK H. NORCROSS, District Judge.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANCES MACKINNON PUSEY, et al.,

Defendants.

This case came on regularly this day for trial, C. M. Carpenter, Esq., Asst. U. S. Attorney, appearing as attorney for plaintiff, and Carey Van Fleet, Esq., appearing on behalf of the defendant. Plaintiff's demurrer to the Amended Answer to Amended Complaint heretofore submitted being fully considered, it is ordered that said Demurrer be, and it is hereby overruled. * * * [45]

[Title of Court and Cause.]

VERDICT.

We, the jury, find for the defendants in the above entitled action.

ALBERT M. BENDER,

Foreman.

[Endorsed]: Filed Oct. 10, 1929 at 10:05 A. M.

WALTER B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk. [46]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 18342-K

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANCES MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON, JR., FRANCES MACKINNON COIT, and JOHN S. DELANCEY, Guardian of JUNE MACKINNON DELANCEY, a Minor,

Defendants.

JUDGMENT ON VERDICT.

This cause having come on regularly for trial on the 3rd day of October, 1929, being a day in the July, 1929 Term of said court, before the Court and a jury of twelve men, duly impaneled and sworn to try the issues joined herein; Chellis M. Carpenter, Esquire,

Assistant United States Attorney, appearing as attorney for plaintiff and Carey Van Fleet, Esquire, appearing as attorney for defendant; and the trial having been proceeded with on the 3rd, 4th, 9th and 10th days of October, in said year and term, and oral and documentary evidence on behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the jury and the jury having subsequently rendered the following verdict, which was ordered recorded, namely: "We, the jury, find for the Defendants in the above entitled action. Albert M. Bender, Foreman," and the Court having ordered that judgment be entered in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action and that defendants go hereof without day and that said defendants do have and recover of and from said plaintiff their costs herein expended taxed at $52.80.

Judgment entered October 10th, 1929.

WALTER B. MALING,
Clerk. [47]

[Title of Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME AND TERM WITHIN WHICH TO FILE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED by and between

the parties to the above entitled action that the plaintiff may have to and including the 29th day of January, 1930, within which to prepare, file and serve its proposed bill of exceptions, and

IT IS FURTHER STIPULATED AND AGREED that for the purpose of preparing, settling, signing and filing the bill of exceptions in the said case the July 1929 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 8 of the Rules of this Court, be extended to and into and so as to include the November 1929 term of said Court, to the *29th day* of January, 1930, thereof.

Dated: October 14, 1929.

GEO. J. HATFIELD,
By Chellis M. Carpenter,
Asst. United States Attorney, Attorney for Plaintiff.

CAREY VAN FLEET,
Attorney for Defendant.

It is so ordered.

FRANK H. NORCROSS,
United States District Judge.

[Endorsed]: Filed October 14, 1929.

WALTER B. MALING,
Clerk.

[Title of Court and Cause.]

ORDER EXTENDING TIME AND TERM WITHIN WHICH TO FILE BILL OF EXCEPTIONS.

Good cause appearing therefor, IT IS HEREBY ORDERED that the plaintiff above named may have to and including the 20th day of February, 1930, within which to prepare, file and serve its proposed bill of exceptions, and

IT IS FURTHER ORDERED that for the purpose of preparing, settling, signing and filing the bill of exceptions in the said case the July, 1929, term of the above entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 8 of the Rules of this Court, be extended to and into and so as to include the November, 1929, term of said Court to the 1st day of March, 1930, thereof.

FRANK H. NORCROSS,
United States District Judge.

[Endorsed]: Filed January 27, 1930.

WALTER B. MALING,
Clerk.

[Title of Court and Cause]

STIPULATION FOR SENDING EXHIBITS AND CERTAIN MOVING PAPERS AND ORDERS THEREON TO CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

IT IS HEREBY STIPULATED by and between the parties hereto by their respective counsel that each of the exhibits introduced in evidence in the trial of the above entitled action be sent up to the Circuit Court of Appeals, Ninth Circuit, to be used in the appeal of the above entitled action by the said appellate court in lieu of certified copies thereof, and to be used by said appellate court to the same extent as if incorporated at length in the bill of exceptions herein, and

IT IS FURTHER STIPULATED that the following papers may be sent up to the Circuit Court of Appeals, Ninth Circuit, in lieu of incorporating them in a bill of exceptions:

1. Notice of and motion to set aside order extending time and term (filed February 14th, 1930).
2. Order denying defendants' motion to set aside order extending time and term; [50]
3. Notice of and motion to strike bill of exceptions (filed February 14, 1930);
4. Order denying motion to strike bill of exceptions;
5. Notice of presenting bill of exceptions for settlement (filed February 19, 1930);

6. Notice of protest against settling bill of exceptions (filed February 19, 1930);
7. Order submitting matters settlement bill of exceptions to Judge Norcross;
8. Order vacating minute orders February 13 and 17, 1930;
9. Order denying motion to set aside order extending time to file bill of exceptions and other motions (filed March 3, 1930);
10. Exception to order denying motions and protest.

Dated: March 21, 1930.

GEO. J. HATFIELD,
United States Attorney, Attorney for Plaintiff.

CAREY VAN FLEET,
Attorney for Defendants.

[Endorsed]: Filed, March 21, 1930.

WALTER B. MALING,
Clerk. [51]

[Title of Court and Cause.]

PLAINTIFF'S PROPOSED BILL OF EXCEPTIONS.

To Frances Mackinnon Pusey, George G. Mackinnon, William H. Mackinnon, Jr., Frances Mackinnon Coit, and John S. Delancey, Guardian of June Mackinnon Delancey, a Minor, defendants herein, and to Carey Van Fleet, Esq., their attorney:

You, and each of you, will please take notice that

the attached constitutes plaintiff's proposed bill of exceptions.

GEO. J. HATFIELD,

United States Attorney, Attorney for Plaintiff. [52]

[Title of Court and Cause.]

ENGROSSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 3rd day of October, 1929, the above-entitled cause came on for trial before the Court sitting with a jury, and thereupon the following proceedings took place:

Messrs. Geo. J. Hatfield, United States Attorney for the Northern District of California, and Chellis M. Carpenter, Assistant United States Attorney for said District, appearing for the plaintiff, and Carey Van Fleet, Esq., appearing for the defendants.

THE COURT: Mr. Clerk, you may enter an order that the demurrer to the amended complaint is overruled.

(A jury having been empaneled, the following proceedings were had:)

MR. CARPENTER: I desire to offer in evidence that portion of the March, 1923, assessment list showing an [53] additional assessment of $3114.68 against the estate of William H. Mackinnon of Oakland, California, being a certified copy, certified to by the Secretary of the Treasury under Section 882 of the Revised Statutes. I offer it for the purpose merely of showing that the Commissioner made an assessment at that time.

MR. VAN FLEET: I will object to it, not to the form of it or the authenticity of it, that it is not within the issues of this case. This suit is for money had and received.

THE COURT: The objection will be overruled.

MR. VAN FLEET: An exception.

(Document marked Plaintiff's Exhibit No. 1.)

GEORGE G. MACKINNON, one of the defendants, called as a witness on behalf of the plaintiff, being first duly sworn, testified:

I am the son of William H. Mackinnon, whose estate is involved in this suit. The moneys which were refunded to my mother and the various heirs, the different checks that were received from the government, have not to my knowledge ever been paid back to the government. If it had I certainly would know about it; I know I did not pay back what I am being sued for.

CROSS EXAMINATION.

MR. VAN FLEET: Mr. Mackinnon, what became of the money that you received from the government?

MR. CARPENTER: Objected to as immaterial.

THE COURT: Objection sustained.

MR. VAN FLEET: That will be all, your Honor.

MR. CARPENTER: That is the government's case. We rest. [54]

MR. VAN FLEET: At this time, if your Honor please, I move for a nonsuit upon the ground that there is no evidence to sustain the allegations of the complaint. The complaint is based upon money had

and received. They do not show in what way the money was received or why it should be paid back. They have not shown anything.

My motion for a nonsuit is based upon the following grounds: The insufficiency of the evidence of the government to support the allegations of the complaint, in that it has not been shown that Frances Mackinnon Pusey, or George G. Mackinnon, or William H. Mackinnon, Jr., or Frances Mackinnon Coit, or John S. DeLancey, guardian of June Mackinnon DeLancey, a minor, have money which belongs to the government in equity, in good conscience. The basis of this action is for money had and received. It must be based, under the authorities in California—I think your Honor has a number of them, but I will repeat them here.

THE COURT: Are you referring now to the point raised in the brief as to an action for money had and received, in the nature of an equitable proceeding?

MR. VAN FLEET: Yes. And the government must show that these defendants have money which in equity and good conscience should be repaid to the government.

(Thereupon counsel argued the matter, at the conclusion of which a recess was taken until 2 o'clock p. m.)

THE COURT: Is it stipulated the jury is present?

MR. VAN FLEET: It is so stipulated.

MR. CARPENTER: It will be so stipulated, yes, your Honor.

THE COURT: The motion for non-suit will be denied.

MR. VAN FLEET: Exception, if your Honor please. [55]

MR. VAN FLEET: To complete the record of proof, if your Honor please, I offer in evidence as the basis of the action, since the government did not put it in,—but it will not be necessary for me to read it to the jury,—but this is form 706, but it contains the valuation of the property, which it is necessary for me to refer to later, the real property which was deeded by the husband to his wife, and I offer that in evidence. It is already in evidence on the equity side, and I offer it in this case.

MR. CARPENTER: Objected to on the ground that it does not come within the issues of this case.

MR. VAN FLEET: If your Honor please, it states the valuation of the property, which is the basis of the Government's case, which is Form 706, upon which the estate taxes are based. It is necessary for me to refer to it to show the value, the difference in value as between the estate as probated and the transfers. It can't prejudice the government's case in any way. It is already in evidence.

MR. CARPENTER: You are offering it for that limited purpose, are you?

MR. VAN FLEET: Yes; I am offering it for all purposes.

MR. CARPENTER: Then my objection still stands.

MR. VAN FLEET: It is already in evidence in the case.

THE COURT: Is it a matter that affects the amount?

MR. VAN FLEET: Yes.

THE COURT: —by any possibility?

MR. VAN FLEET: Yes.

MR. CARPENTER: I will withdraw my objection to its being offered for the limited purpose of showing what value the commissioner placed on the property which was trans- [56] ferred and also to show the value of the property in the entire estate; but as to any other purpose or matters for which counsel might be offering it, I stand on my objection.

THE COURT: The objection will be overruled.

MR. CARPENTER: Exception.

THE COURT: It is admitted for whatever it may be worth.

(The document was thereupon marked Defendants' Exhibit "A" in evidence.)

MR. VAN FLEET: Now I offer in evidence the notice of adjustment of all these claims under which the money was paid back to all these defendants, if your Honor please.

MR. CARPENTER: Objected to for the reason it is not within the issues of the case as it is admitted by the pleadings.

MR. VAN FLEET: If your Honor please, it is the basis of the whole claim of the government, and of our claim that there was no mistake. This is the allowance of the claim for refund, the final allowance if your Honor please.

MR. CARPENTER: That is admitted.

MR. VAN FLEET: That doesn't make any difference whether that is admitted or not. It is proper to put it in the record to keep the record complete.

MR. CARPENTER: It is signed by the commissioner and shows that the claim for refund was allowed and paid, and shows the date of that.

THE COURT: The objection at this time will

be sustained on the ground that it is admitted by the pleadings that there was a refund. Do you desire an exception noted to these rulings, Mr. Van Fleet?

MR. VAN FLEET: Yes, your Honor. I now offer in evidence a check which was paid by the government to these [57] various defendants, and I offer it for the purpose of showing what became of the money in this case, which is one of my defenses—

MR. CARPENTER: Objected to for the same reason—

MR. VAN FLEET: This is the point we will prove. We will prove that all these checks were turned over to Mrs. Mackinnon, and she having paid the taxes in the first place, that none of the money was retained by these various defendants.

THE COURT: The objection will be overruled.

MR. CARPENTER: Exception.

(The documents were thereupon marked Defendants' Exhibit "B.")

MR. VAN FLEET: I offer the decree of distribution, which shows the amount of the estate which went through probate, if your Honor please, which has to do with my defense of transfer, that the transfer of the real property was in good faith and what the value of that was, and what the value of the estate that went through probate was, to estimate the tax.

MR. CARPENTER: You are offering it for the purpose of showing values, counsel?

MR. VAN FLEET: Yes.

MR. CARPENTER: Well, I object to it on the ground it is secondary evidence. It doesn't give us the right of cross-examination. If they want to show value they should bring the people here who are qualified to testify to it.

MR. VAN FLEET: This fixes the amount which went through probate and which is taxable.

MR. CARPENTER: That has nothing to do with this case.

THE COURT: What is this, the decree of final dis- [58] tribution?

MR. VAN FLEET: Yes, your Honor, the decree of final distribution. The amount of real property which was transferred, as we will show, was $386,000 and the estate tax was levied on that. The only amount that went through probate was $125,006.19; and, of course, if my defense is good upon the ground that that transfer was bona fide before his death, then there is no tax due. That is the purpose of offering this in evidence.

THE COURT: It will be admitted subject to being connected up later on. For the present the objection will be overruled.

MR. CARPENTER: May I have an exception?

THE COURT: Yes.

(The document was thereupon marked Defendants' Exhibit "C.")

THE COURT: Subject to a motion to strike, if it is not. Proceed.

GEORGE G. MACKINNON, one of the defendants, called as a witness on behalf of the defendants, testified:

My full name is George G. MacKinnon, I was one of the administrators of the estate of William H. MacKinnon, deceased. My brother William H. MacKinnon, Jr., was the other administrator. I paid the estate tax on this estate. The documents which you show me are my receipts.

MR. VAN FLEET: I offer this in evidence, if your Honor please.

MR. CARPENTER: Objected to on the ground that they do not come within the issues of the case; that they are admitted in the pleadings, payments admitted. [59]

THE COURT: They will be admitted subject to a motion to strike.

MR. CARPENTER: Exception.

(The documents were thereupon marked Defendants' Exhibit "D.")

THE WITNESS: The audit and review which you show me, I received from the Treasury Department on March 15, 1923.

MR. VAN FLEET: I offer it in evidence. It contains the appraisal made by the government of the value of that transfer, if your Honor please.

THE COURT: Is that the transfer referred to in your pleadings?

MR. VAN FLEET: Yes.

MR. CARPENTER: I object to it upon the ground that the value placed upon the transfer as shown by the return is the best evidence.

THE COURT: The objection will be overruled.

MR. CARPENTER: Exception.

(The document was thereupon marked Defendants' Exhibit "E.")

MR. VAN FLEET: Q. But, as I understand you, the government put a value on the transfer which was made by your father before his death to your mother, and the real property contained in that transfer is not contained in the decree of distribution. That is merely to point it out to the court, if your Honor please, and the jury.

THE COURT: Isn't that shown by the reports and the records?

MR. VAN FLEET: I suppose it is, if you read that word "transfer" in that way. I wanted to bring that out.

MR. CARPENTER: I object on the ground that the records are the best evidence. [60]

THE COURT: I think that probably is true, but I will overrule it, to clear it up.

MR. CARPENTER: Exception.

THE WITNESS: A. No, the transfer was not included in the final decree of distribution.

I am the son of Mr. William H. MacKinnon. My father died January 16, 1921. I saw him right up to the day that he died. At that time he told me he had transferred certain of his properties to my mother. He told me that about the middle of December, 1920. I had conversations with him previous to that time with reference to transfers to my mother; he spoke off and on for ten years before that about making transfers. I don't recall just when and where it was,—off and on. One conversation he told me about, at my father's home; my mother was there, my wife was there and myself; that was about I should judge the 14th or 15th of December, 1920. I can't pin myself down to a particular date, or who was present; I don't remember.

MR. VAN FLEET: Q. Well, at that time, knowing the date when he paid off the mortgage,—do you remember that date?

A. I can't recall it—it was sometime during the year—the latter part—I think it was in November, 1919.

Q. Well, what did he state to you at that time and who was present.

A. I don't think anybody was present, except he and I.

Q. And what did he state to you at that time?

A. That as soon as he got all the properties clear—

MR. CARPENTER: Just a moment. I object to that on the ground that it is too far remote in point of time to show the condition of the testator's mind.

MR. VAN FLEET: Well, it was in November, 1919.

MR. CARPENTER: And he died in 1921. [61]

MR. VAN FLEET: He died in 1921, yes.

MR. CARPENTER: And the transfer was made a month before his death.

MR. VAN FLEET: And we can show the course of his mind, of his intentlon, in the testator's mind for several years back, under the authorities.

MR. CARPENTER: I take issue with you on that.

THE COURT: Objection overruled.

MR. CARPENTER: Exception.

MR. VAN FLEET: Q. And what was that conversation?

A. That he intended to deed certain properties to my mother.

MR. CARPENTER: I object and ask that the answer be stricken out, and I ask that the witness be instructed to state just what the conversation was, not give his conclusion of what it was.

THE COURT: The answer may go out; and state the conversation, as near as you can recall it, just what he said.

THE WITNESS: Well, he told me that he in-

tended, after certain things were cleaned up, to deed certain properties to my mother. He had been telling me that for ten years.

MR. VAN FLEET: That last may go out, if your Honor please.

THE COURT: With respect to telling him that for ten years, that may go out, and the jury is instructed to disregard it.

THE WITNESS: At the time that my father made this transfer to my mother, I think it was some time in December, I was in Oakland; I was not present at the time it was made. As to the state of my father's health at that time it appeared to me like he always had been, well and healthy. He never [62] said anything to me about his health.

MR. VAN FLEET: At about that time were you contemplating a trip with your father?

A. Yes, I was contemplating a trip. He wanted me to take him on a trip.

Q. Where to? A. Fresno.

Q. And just what time was this?

A. I was playing cards with him on Saturday night, on the 15th of January up to half past eleven at night and then he made arrangements for me to take him to Fresno on the following Monday.

MR. CARPENTER: If your Honor please, I ask that the testimony as to his state of mind subsequent to December 15, 1920, be stricken. The witness is now testifying to the deceased's actions in January, just prior to his death.

MR. VAN FLEET: Well, under the authorities, if your Honor please, the declarations of the donor and the circumstances surrounding the gifts can be made both before and after the transfer.

THE COURT: That is more with respect to his health rather than state of mind at that time. The objection will be overruled.

MR. CARPENTER: Exception.

THE WITNESS: My father was at the family dinner on Christmas day, on December 25, 1920. My mother and father, and my wife, myself, and I think little June DeLancey were there. She is a granddaughter. And I don't know, my sister Fanny, and Willie, was there, and my father sat at the table and carved the turkey and was the whole life of the party. In fact, he opened a bottle of champagne on the strength of the Christmas dinner, and drank it,—drank a little himself. Thereafter, about January 10th or along in there he was taken ill. They called in the doctor. The doctor was there. I think it was Dr. Coiter. That was 1921; and [63] he died January 16, 1921. I was not with him at the time that doctor was called in; I happened to be up there once when the doctor was there; that is how I found out the doctor was called in. That was the first time I knew of a doctor having been called in for him. At the time of his death my father was 63 years and 11 months old. He was a man that weighed, oh, probably 275 pounds. As far as I know during the last year before he died he was as active as he had been for the last ten years. At the time my father died, I was at my home. The last time I had seen him before that, was the night before; I left him about half past eleven after playing cards with him up to that time. He did not say anything at that time about the transfers he had made to my mother. I received the check which you show me made payable to the order of George G. MacKinnon, heir of William G. MacKinnon, $1410.00, and signed

by the disbursing clerk of the Treasury of the United States. I endorsed it and turned it over to my mother. I never kept any of the money. I turned it over to my mother because she paid all the taxes in the estate and if there was any comeback she was entitled to it.

CROSS EXAMINATION.

I don't know that Dr. Shannon had ben attending my father all during the year 1920; it might have been possible that he may have and I might not have known of it; I was not living at the same house with my father. My father never complained of his health to me, never. He never would complain about his health, other than the gout, he used to complain about that. I was present the night before his death. The last time prior to that time that I was present with him was probably the Tuesday or Wednesday before that. [64] That would be three or four days before his death. So, that with the exception of being with him the last night before he died, I don't think I was with him for three or four days before his death. The night before he died, I was there from probably half past seven to have past eleven. On the previous occasion I was there about the same time. I went up to play cards with him in the evening. I don't know the exact date when Dr. Coiter was called in. When I visited my father on the last evening prior to his death, he was not in bed. As to whether Dr. Coiter is an expert diagnostician from Oakland with offices in the Franklin Building, I couldn't answer that; I don't know. With reference to the time I was there on the last occasion, my father died the next day, I think, about one o'clock in the afternoon. I don't know of my own

knowledge what time he went to bed for the last time; I guess he went to bed after I left him. I don't know. I don't know of my own knowledge of his having been in bed all day on any previous occasion. I think he had one nurse attending him for the last three days; it couldn't be possible that there were two nurses attending him during the last three days of his life on earth without my knowing it. I think he had one nurse there a day or two; I think a day or two before he died; as far as I know it was only one. I don't know who called the nurse. I should judge when he died, my father weighed probably 260 pounds. He was a man who weighed upwards of 300 pounds at one time, then he went down to about 275 pounds. I think that is his weight. He lost probably 25 pounds in the five years before his death. I don't know but I should judge he weighed about 260 or 275 possibly at the time he died. He had been weighing that much probably [65] for five years before he died. I never saw the nurse personally attending my father. I never knew he was in bed. I never saw him taking any treatments of any kind. I don't know who it was that called Dr. Coiter in; it was probably my mother. As to my being sure it was not Dr. Shannon, I couldn't answer that; so far as I know it might have been anybody, I don't know. I fix the date for the transfers that I speak of as being around the middle of December because it kind of shocked me when they told me what he did and I didn't forget about the date when he told me. I am fixing that by reason of the dates on the deed.

RE-DIRECT EXAMINATION.

I tried to have the Government make the whole check payable direct to my mother, and I took it up with them and wrote them letters in Washington. The documents you hand me are the letters and the answers to them, or copies of them, some of them. They are letters from the department to me and copies of my letters to them.

JOHN S. DeLANCEY, called as a witness on behalf of the defendants, being first duly sworn, testified:

I am an attorney at law. Mr. William H. MacKinnon was my father-in-law. My daughter is June DeLancey; she is one of the heirs of the estate who is being sued here; I am her guardian. I remember when he died in 1921. Previous to his death in 1921, I had been handling his property for him, for a number of years I had been assisting him and working with him, I guess ten or twelve years; somewhere in that neighborhood. He asked me to make out deeds to the various properties to Mrs. MacKinnon, Mrs. Pusey now. I did that. [66] The documents which you hand me are the deeds, seven of them, which I made out. I gave them to Mr. MacKinnon. I was not present at the time that he transferred them to his wife. I was there when he executed them, although not when he acknowledged them. He executed them at his home; I brought them up to his home. That is his signature on each of them and that is my signature there, signed as a witness. I afterwards recorded them. The deeds are dated December 13, that is when I made them out; I saw him on that day; I think it

was the first thing in the morning, about nine or ten o'clock. I believe that is when he signed them. He did not acknowledge them at that time. He acknowledged them subsequent to that. Yes, I had a conversation with him at the time I made out the deeds for him. Mr. MacKinnon and myself were alone. He asked me—he wanted to give his real property to his wife, in the various counties, and he asked me to bring up the deeds, make them out and bring them up to him. I brought up these deeds, which are in rather peculiar form and we had a discussion about them. He executed them and put them in the drawer at his home. He had never discussed with me the purpose of executing these deeds before that time.

MR. VAN FLEET: Q. Did you ever have any conversation after the deeds were executed?

A. Oh, yes, I did.

Q. Where was that and when and who was present?

A. When he acknowledged the deeds, I don't remember the date. I was present and he says, "John, I am now a pauper."——

MR. CARPENTER: Just a minute. If you are asking for the conversation that took place I would like to urge the objection I made formerly, that it is coming after the transfer was actually made, that it is inadmissible to show [67] the state of mind of the testator at the time the transfer was actually made.

THE COURT: The objection is overruled.

MR. CARPENTER: Exception.

MR. VAN FLEET: You may answer.

A. He says, "I am now a pauper. I have got to depend upon"—I forget just what he called Mrs. MacKinnon, but he was speaking of his wife,—"I

have got to depend on her for anything I want from now on."

Those properties were bringing in quite a little rent; quite a good deal. I don't know what became of the rents of that property. Some of the rents I collected and I turned it over, but somebody else collected the rents; I don't know who it was. That was before he died. They we coming due at odd times, you know. He had a bank account at the Oakland Bank of Savings.

MR. VAN FLEET: Q. Did you have any conversation with him just before he died? A. Yes.

MR. CARPENTER: Just a minute; who was present and when did it take place?

MR. VAN FLEET: Q. Just before he died?

A. There was a nurse present; she was in and out of the room. I think the nurse was out of the room and Mrs. MacKinnon, Mrs. Pusey, now, was in and out of the room. I was talking to him. That was the morning of his death, and that is all that was present.

Q. Where was he at that time?

A. He was sitting in a chair in his room and talking to me.

Q. And did he say anything at that time about an impending demise or that he was expecting to die?

A. No; he was not feeling well, and he stated he would like to see another [68] doctor and I told him that I would make an arrangement to take him to the city the following day, or would make an arrangement to have Dr. Moffatt of San Francisco come and see him.

MR. CARPENTER: If your Honor please, may it be stipulated that my objection—otherwise I would have made an objection to this question—that my ob-

jection to all the declarations and conversations had with the testator after the alleged transaction was made, be considered and deemed to be objections to all the rest of the line of testimony in this same case?

THE COURT: It may be so understood and an exception noted without further objection.

MR. VAN FLEET: Q. Had he ever been ill before, to your knowledge?

A. No; the usual colds. He used to get heavy colds, but that was all.

Q. Had he been active in his business affairs before that time?

A. Well, he was not very active for a number of years. He would get down to his office late and he would go home early. He didn't give much active attention to it for the last few years prior to his death.

Q. You say that before that time he had never discussed with you the deeding of his property to his wife?

A. Not prior to his asking me to make the deeds out.

Q. Oh, by the way, when it came to the probating of the estate, the heirs never contested this deed, did they?

MR. CARPENTER: That is objected to as immaterial and not within the issues of the case.

MR. VAN FLEET: It is for the purpose of showing the heirs all accepted the fact that the father transferred the property to his wife. [69]

THE COURT: Objection overruled.

MR. CARPENTER: Exception.

A. No. I accepted the fact that the property had been transferred to his wife. I represented my daugh-

ter, and she would have had a considerably larger interest.

CROSS EXAMINATION.

I drew the deeds almost immediately upon receiving instructions to do so. It was not on the same day; I think it was the previous day that he told me to do it, and I think it was the following morning before I went down to my office that I brought the deeds in to him. At the time he gave me those instructions, I saw him at the house. He did not call me there; I visited there every day, nearly every day. I was at the house. My daughter lived there at their home, you see. I was not living there. I went over this morning one day prior to the time that the actual handing over of the deeds took place. No, I won't say at that time he gave me instructions to draw the deeds. I was there every day. I was at that house every day and he told me to draw the deeds, and the following day I brought the deeds up. No, I wouldn't say that the deeds were actually handed over to Mrs. MacKinnon on one day and the instructions to me to draw them were given to me on the previous day in the morning. I am not certain of the day they were handed to Mrs. MacKinnon. I was not present at the time. I think probably the instructions to draw the deeds were given to me on the 12th of December. Those instructions were given to me by Mr. MacKinnon. I don't think he went to work that day. He would ride down to work in the machine, but that had been so for a period of a year, but not from illness. [70] Yes, he had been going down to the office, but some times he would come down for an hour or two and some times he would come down and stay longer; but some times he would not appear for

two or three days. The last time that I know, of my own knowledge, prior to the time that the actual deeds were made out by me, he visited his office I think about two weeks before he died. I know that because he went out and got a haircut and went around to the office and then went back home; I was not with him. I would say that the last time I remember him being at the office was probably the early part of December. That, I assume, but I was not always at the office. At that time he weighed in the neighborhood of 300 pounds. He always was a man of that weight; a very large man. He did not weigh any more subsequent to that time and prior to his death; I think he was slightly lighter, not much, but slightly lighter than he had been, because he had been dieting for some time; that is, he had not been eating so much for some time; but there were times when he weighed as high as 340. I think some ten or twelve years prior to his death he weighed as much as 380; I think that is the maximum weight I heard he had acquired. I remember of testifying at the former trial here; I don't remember of giving the impression at the time he made out these deeds he was a man weighing 380 pounds, but I probably did; I might have given the impression that he was a very exceptionally heavy man.

When I spoke of not having been present when the deeds were acknowledged, acknowledging a deed is going before a notary public and attesting your signature to be genuine. I would say that at the time he made out the deeds he had a heavy cold, had a cold about that time. [71] I visited the home and saw him nearly every day for years, I guess, and just prior to his death. Well, he had had an attack of gout;

when I said he hadn't been well before that time, I had overlooked the fact that he had had an attack of gout and was confined to his house on account of the ailment and he was confined for quite a period of time. The symptoms in connection with this gout—you know—his toe had swollen up and he had it wrapped up and he would keep it up on a chair. I did not notice anything in connection with his breathing at that time; at the time of the execution of these deeds he was absolutely normal, outside of, as I say, of a cold, as far as was apparent to me. Well, I don't know that at any time subsequent to that and up to the time he died, within that month, that he experienced any difficulty in breathing; I can't remember that he did. It is possible that he did; I can't remember that, but if it was it was just shortly before his death, because I know they got the nurse in about a week before he died, and at that time he was confined to the house. He had two or three doctor friends, —Dr. Shannon was one of them. I don't think he had been calling regularly; he may have and I not know about it; they were friends; they went off on trips together, personal pals. I knew that Dr. Coiter had been there because I had been told, but I did not see Dr. Coiter there. They told me Dr. Coiter had been in, and, as I told you, I had made arrangements to see Dr. Huntington over here or Dr. Moffatt, this big doctor over here, myself. That was the morning he died. The morning he died he was sitting up in a chair; he did not have his foot propped up; I don't believe there was anything the matter with his foot at that time. The symptoms were not very apparent. He just simply [72] said he didn't feel good, and if I could arrange it he would like to see somebody, and

I suggested he see Dr. Moffatt, and we were talking just casually; everything seemed to be all right. I think just about a week before he died Dr. Coiter was called in, or that is my information on the subject. I don't think it is possible that he might have been there since the 30th day of December, because when Dr. Coiter came in I think he ordered a nurse; the nurse was there about a week; that is my reason for saying Dr. Coiter was not called in until December 30th. I said Dr. Shannon and Mr. MacKinnon were personal friends and Dr. Shannon's being there would not mean anything to me. He was not there. I wouldn't say that my visits were confined to short visits once a day. I played cards and talked to him. He was a mighty fine father-in-law and I liked to stay and talk to him.

I was not working at the time; I did not have any position nor was I practicing my profession. I had an office with him. During the last week of his life, I saw my father-in-law at his house probably every day for an hour, maybe a little longer. The visit I had with him the last day, I was with him probably an hour before he died and was there with him when he died. That was the same visit. I did not notice any acceleration in his breathing; he was sitting in the chair. He was not having any trouble trying to get his breath. While I was there the nurse did not give him any treatments or any medicine; the nurse didn't even come into the room excepting to look in and go out. He was covered with a blanket over his knees. He was not delirious. He didn't want to go to Fresno with me. I was going to go over to the city and see Dr. Moffatt the following day. I believe that was Monday. I am not positive of the day but [73] he died on a Saturday morning, I think he died, and

I was going to the city the following Monday morning. At the time he was sitting in the chair, I don't remember whether the bed was made up or whether it was ready for him to get back into bed as soon as he desired to. I don't remember how long he had been sitting there in the chair; he was sitting in the chair when I got there and he died in the chair. His head dropped forward and he died. When I saw him the day previous to that he was sitting in that chair too. I don't know if he had the robe over his knees; but he invited me to come to dinner that night. The day prior to that and several days prior to that it is my recollection that he was in the chair then. He didn't want to discuss anything about his own personal feelings, and he didn't do so with me any more than with anyone else. He was a man who was naturally a man who was averse to complaining about his own condition, particularly as to physical conditions. He prized himself on always having been a well man. I would say he was the kind of a fellow, if he had been ailing, would try to keep it from other people. We had so many things in common to talk about that I don't remember he discussed doctors with me during any of the visits I made during the last week, but this particular time that we had a talk about Dr. Moffatt and I believe that was my suggestion to him rather than his suggestion to me.

Mr. MacKinnon was so stout it would be hard to judge how tall he was; he was taller than I am, probably two inches taller than I am; I am five feet, nine.

I don't know if the Oakland Bank of Savings is the only bank he had any money in during the month of December, 1920; that would be my recollection. If he had any in any other bank, it would be a minor

amount. That was the large [74] bank account where he kept his funds.

I never received any money from the government for my daughter. I am a defendant on behalf of my daughter, as her guardian. I, naturally, was sued. I received a check for fourteen hundred and some dollars and gave the check to Mrs. MacKinnon. I am still her guardian. Sure, I endorsed that check as her guardian; I probably would have had to endorse it to cash it. I paid no money to the Commissioner in reference to my ward at all.

I did not notice on any of my visits that the deceased was having any difficulty, which was apparent to me, with the functioning of his kidneys.

RE-DIRECT EXAMINATION.

The check you show me is the one I received from the government, a photostatic copy of it; it is endorsed just exactly as it is made out on the face of it, by me. I turned it over to Mrs. Pusey immediately.

J. E. SHANNON, called as a witness on behalf of the defendants, being first duly sworn, testified:

I live in Berkeley. I have been a practicing physician in Berkeley and Oakland for thirty odd, about thirty-five or thirty-six years, I don't remember exactly. Since 1893, however. General medicine and surgery. I knew Mr. William H. MacKinnon during his lifetime. I could not say definitely how long I had known him; I would say fifteen or twenty years. I was not closely acquainted with him during that time, but for seven or eight years prior to his [75] death I was. We were very close friends during that period.

I was partially, not totally, the family physician during that time, because I think there were other doctors who were called in at times. I think the last time I saw Mr. MacKinnon before he died was on the—well, as I remember, on the 24th of December. He was well with the exception of a cold that he complained of at that time. I don't think I had any conversation with him at that time with regard to his business affairs; I don't remember. I had a conversation at his home, I don't know that anyone was present. He told me that he had deeded his property to Mrs. MacKinnon and he told me that he had made a deed,—he called it a blanket deed. He said his lawyers had said it was no good, but he said "the lawyers didn't know it all," kind of joshing. Before that time, say before the 15th of December, 1920, I don't think I had seen him very frequently, maybe every week or such a matter. The conversation I have already related is about the extent of the conversation we had relating to his property or his business affairs.

We frequently traveled to Fresno together. He had interests there and I had interests there, but our business was not connected in any way. There was no trip that I remember of, to Fresno a short time before he died or near that period; some time before that there was.

During this period, with reference to his health, I never discussed that with him; sometime probably along about the middle of December, 1920, as near as I remember, I called at his office and I advised him to go home. He had a very cold office, and I saw he had some cold and I told him he better go home and take care of himself. That was the extent of my advice. I volunteered that. [76]

I was not there at the time he died, nor was I in

attendance on him at that time; I was in Fresno County. I did not call in another doctor; I did not call in Dr. Coiter. On the 24th I was called very hurriedly down to the ranch I had and I went by and told him I was going to be out of town. He usually expected me to call or see him or something of that kind. We were very particular friends and sometimes played cards together. That was the 24th of December, and I told him that Dr. Miliken would take my place while I was away. He was not in bed at that time. He was not out of the normal at that time when I saw him on the 24th of December. I never discussed with him his sudden death or impending death in any way whatsoever, nor did I ever tell him he was in danger of dying suddenly. I do not know what he died of. I was not expecting him to die, particularly. I did not tell him as his family physician, that he had better take care of his affairs, that he was in danger. I would say he was of a cheerful disposition. He was rather inclined to be reticent about his affairs.

CROSS-EXAMINATION.

I did not expect him to die. I testified on the former trial of this case.

MR. CARPENTER: Q. And where the court asked you? "You didn't inform him he was suffering from any fatal illness, did you?" "A. No."

"Q. Was he?"

"A. Well, I would not say that, except that his physical shape, he was an exceedingly stout man, and I was not surprised, you might say, that he went off as he did." [77]

I so testified. That was correct, I was not surprised.

My testimony a few minutes ago was not incorrect; I did not explain any reason. I would not be surprised owing to his physical condition,—being an excessively fat man and not very active physically. We are never surprised with that kind of a man dropping off suddenly, either from heart trouble or apoplexy or any of those things that carry people off suddenly.

That is not the reason I told him that Dr. Miliken would look after him after I left. I merely told him that in case the family needed me. Dr. Miliken was representing me. If anyone was sick he would attend to the case and he would return the case to me after I returned. That is, in case I was called; and if they called another doctor outside of me, he would not have any reason to return the case to me.

I can tell you the symptoms of myocarditis to some extent. I might not be able to go through the whole series. As far as I know they are rapid pulse, a weak pulse and temperature; those are the main symptoms. Not necessarily rapid breathing nor accelerated breathing, unless there was some effusion accompanying it, which does occur occasionally. Not necessarily kidney trouble complications; some times they are present. Well, I have known people in that condition where the mind was not as clear, and I have known of them to go without any evidence of the mind being clouded. Myocarditis is inflammation of the muscles of the heart. It has a general weakening effect upon the rest of the body. It is a very serious disease. A person who died of that ailment I think would know that he had it and would be expecting death most any time. I have no reason to believe [78] from my attendance of Mr. MacKinnon, the deceased, during the month of December, that he was suffering from

myocarditis. I don't think I ever heard afterwards that that was the cause of his death as pronounced by any doctor, or had any report or heard anything definite. I did not talk to Dr. Coiter after my return. I don't know that Dr. Miliken was called at all. The condition that I thought would cause him to drop dead so that I would not be surprised of the fact of his having done so was owing to the excessive fat, I would have suspected more of a fatty degeneration in his condition than inflammatory,—a fatty degeneration in which fats take the place of the muscles of the heart and the heart weakens by that change. I would have suspected something of that kind. I could not tell you how long I had been thinking this; I don't know that I even though of it otherwise than the man's general physical condition. A man that has fatty degeneration of the heart would not be likely to feel that death was impending in some seasonably distant future unless he was in the latter stages when it became very pronounced, he was not. I would say a month before his death.

RE-DIRECT EXAMINATION.

I saw him a month before his death; he gave no indications that he was expecting to die.

WILLIAM H. MacKINNON, one of the defendants, called as a witness on behalf of the defendants, being first duly sworn, testified: [79]

I am the son of William MacKinnon, the decedent in this case, and one of the administrators of his estate. I was with my father four days before his death. My mother, various other members of the

family were there at various times. My mother was there all the time. At that time, four days before his death, I came to the house. I had previously been in the Letterman General Hospital. I returned from there to home on the 12th of January. I had been in the hospital about two months prior to that. At the time the deeds were made, I was in the hospital. When I saw him four days before his death, he told me that he had deeded all of his real property to my mother. I returned to my home on the 12th of January, and after I had talked with him for possibly half an hour or so he said, "Did you know that I had deeded my property to your mother?" And I said yes, I had heard about it while I was in the hospital. At that time I had quite a conversation with him about his illness. There was no one present, as the conversation was principally with reference to my opinions of doctors, whether I thought he was ill, or not, seriously ill. He first asked me what I thought of doctors, and I told him that my experience with doctors had not been very satisfactory, and he said, "Well, they can make a mistake once in a while," and I said I thought so. "Well," he said, "they want me to make a trip down to Fresno." He said, "I am very anxious to go. Do you think you can go down with me, go next week?" That was the early part of the week when he suggested it to me. I told him I thought I could. Then he said, "Well, how do I look to you?" And I said, "You look all right to me," something to that effect, I can't recall any more.

I was with him the day he died. I had just gotten [80] through shaving, and we were laughing about the doctor's orders not to have him shave himself, and I shaved him, and I stepped out of a room

a few minutes, and he died while I was just outside of the room. At that time Dr. Kuder had been called in to attend him. I believe it was just previous to my return home that he was called in.

I had a conversation with him in Fresno, California, my office on Fresno Street; whether it was the year previous to his death, or two years previous I cannot recall. I had been down there about two years.

MR. VAN FLEET: What was the conversation with your father at that time?

MR. CARPENTER: I wish to object to it on the ground it is too remote in point of time, having taken place a year or two years previous to the time that the transfers were made.

THE COURT: The objection will be overruled.

MR. CARPENTER: Exception.

THE WITNESS: He said there were a few more mortgages that he wanted to wipe off before he made a conveyance to my mother. I would recognize my father's signature. I think that is his signature. I received a check from the government for a certain portion of a refund. That is a copy of the check. That is my signature on the back, and that is my mother's signature. I endorsed that check and turned it over to my mother. I did not use any of the money myself. I turned it over immediately to my mother. My father left no will.

MR. VAN FLEET: Q. Did you contest the transfer of this property to your mother?

MR. CARPENTER: Objected to on the ground that the [81] records of probate are the best evidence.

THE COURT: I think that is true. I will permit that to be answered, because it will save some time. Exception. I will permit the witness to answer, notwith-

standing the records are the best evidence, unless there is some further objection to it.

MR. CARPENTER: The further objection to it that it is entirely immaterial, not within the issues of this case, whether this man contested the proceedings in the probate court, that has not got anything to do with the question of whether or not the property was transferred in contemplation of death.

THE COURT: The objection will be overruled and an exception noted.

MR. CARPENTER: Exception.

THE WITNESS: A. No, I did not.

MR. VAN FLEET: What was your attitude with regard to the transfer?

MR. CARPENTER: Objected to on the ground that it does not make any difference what the witness' attitude was.

THE COURT: Objection will be sustained.

MR. VAN FLEET: Q. Did you consider at that time that the transfer to your mother was an absolute gift?

MR. CARPENTER: Objected to on the ground that it calls for a state of mind of this man, that it has no bearing on the issues of this case, and, furthermore, it is in the form of a conclusion.

THE COURT: The objection will be sustained.

MR. VAN FLEET: Q. Just what happened with regard to the proposition of testing the transfer to your mother?

MR. CARPENTER: Objected to on the ground the records [82] are the best evidence.

THE COURT: He has already answered he made no contest.

MR. VAN FLEET: Q. If you had made a con-

test of the transfer to your mother, would you have benefited by it?

MR. CARPENTER? I object to that as a hypothetical question, based upon facts that are not involved in this case, and it is not within the issues.

THE COURT: The objection will be sustained.

MR. VAN FLEET: May I take an exception to your Honor's ruling?

THE COURT: Yes.

MR. VAN FLEET: And an exception in regard to your Honor's ruling on the motion for nonsuit, I don't know whether I put that in the record, or not.

THE COURT: The exception will be allowed.

MR. VAN FLEET: Q. All the money that you obtained from the estate came through probate?

A. Yes.

Q. The real property that was conveyed to your mother by your father, you received none of that, did you, after his death?

MR. CARPENTER: Objected to on the ground that the deed or the transfers are the best evidence.

THE COURT: I will permit it to be answered. Exception.

MR. CARPENTER: Exception.

THE WITNESS: A. I received no portion of the real property that was conveyed to my mother.

MR. VAN FLEET: Q. Why not*e*?

MR. CARPENTER: That is objected to. [83]

THE COURT: The objection will be sustained.

MR. VAN FLEET: Exception. That is all.

CROSS-EXAMINATION.

Prior to my father's illness, if I remember correctly, I went in the hospital in the early part of November, and I left, I believe, on the 12th of January the following year. This conversation regarding the trip to Fresno was on the 12th; I returned in the forenoon of that day. That conversation took place in my home in Piedmont. I had been living in Fresno. I came up from Fresno to the hospital and then when I was released from the hospital I went over to father's home in Piedmont. It took place in my father's bedroom in his home. He was sitting in a chair looking out the window. There was no difference in his physical appearance. I had not seen him, you see, prior to his attack of the gout, or during his attack of gout. I was in the hospital at that time. I don't recall that any particular part of his anatomy was swollen. I knew that he had been laid up with the gout, but I cannot positively say whether his foot was propped up or not; in all probability it was. I can't recall whether he had any covering over him at that time. Except for daily visits to the hospital I stayed at home from that time on. I sat up with him practically every night from the time we finished dinner, sat up in his room, because we seldom went to bed earlier than twelve o'clock. I could not say exactly what time he retired the first day I returned on the 12th of January; it was substantially around twelve o'clock. I retired at that time also. I did not hear him get up after that. I don't know that he did. There was a [84] nurse there with him at that time. She was with him all night. I did not see the nurse

administer any treatment to him during the time that I was there. I can't recall that she administered any medicine; I can't recall if any kind of treatment, except there was an electric vibrator there. I don't recall where that was applied; I merely saw it; I never saw the treatment given; I saw the vibrator there, and I assumed that that was used for him; whether it was for his foot, or not I don't know.

I was there at the time he died. I had never heard of Doctor Kuder before until I saw him in the home. I was not there when he was called in, nor when the nurse was called in; I don't know who called either. I imagine they were there about three or four days before I returned. I base that imagination on a mere recollection of events that took place. I can name one of those events; my siste*d* visited me in the Letterman Hospital, and I asked why father had not been over to see me the last few days, and she said that he was laid up with a cold and with the gout. He had had attacks of the gout many times prior to that time. I don't remember that a cold would accompany them; he was subject to colds quite often. He would not cough; it was more of a cold in his head, and not in his throat or lungs. I don't remember, he might have done some coughing. I would not say that this cold continued during all the time and up to the time that he died. My recollection of the whole four days does not make the cold stand out, at all. If it had been bothering him it would have stood out, I believe. I don't recall that he had any difficulty with getting his breath. While I was there he left the room at times; he went into the bathroom. His room was on the second floor;

the dining [85] room was on the lower floor. During the four days that I was there he did not go downstairs, not to my recollection. Other than the bedroom that he was in while I was there those four days, he went into the bathroom. Nothing abnormal about it that I can recollect; he went in the bathroom three, or four, or five times during the whole day and evening. The nurse did not take care of him with respect to going to the bathroom, in fact, he laughed at me one time in respect to that. The nurse was an efficient nurse, conscientious. I am not sure, but I thought her name was MacKinnon; whether that is the same nurse that I have in mind, or whether it is a nurse we had some other time, or not, I don't know, but I know there was a MacKinnon there, and I thought that was the time.

This money that I received from the government in the form of a check I did not pay any of that money back to the government; I gave it to my mother. The only reason that I do not think that the doctor was called in prior to a few days prior to his death was the fact that this sister of mine called at the hospital and told me that doctors had been called in and a nurse; I don't know of my own knowledge. I do not recall having seen Dr. Shannon there. I have met Doctor Milliken at his home. Many times prior to the time I went into the hospital, I saw Doctor Shannon at my home, recently, in the year 1920. Practically every time I would come up to Fresno to visit home, I would either drive up with father and Doctor Shannon and naturally would have dinner at home, or something like that. Doctor

Shannon had an office at that time. I never went to the office with my father. [86]

RE-DIRECT EXAMINATION.

I paid this money over to my mother because mother had paid the entire tax to the government, and, naturally if there was a refund, I figured that money belonged to her, and not to me. My father's weight in 1909, I believe, in 1908 or 1909, reached the highest point at 350 pounds; I was very conversant with the fact, because he was taking treatments, and I went out with him to one doctor, Dr. Merrill, in Oakland, and the doctor treated him until he had reduced his weight to about 285. Then he ranged between 275 and 300 pounds up until about the time of his death.

My father had been practically retired from active business for a number of years, I would judge a matter of seven or eight years. He had no regular business hours. Sometimes he would go down to the office at ten or eleven o'clock, and sometimes he would not go down in the forenoon at all. That was over a period of seven or eight years. When he gave up active business and just took care of his own personal property, he had no definite business hours at all. If he felt inclined to go down to the office he would go down and if he did not he would not go. That took place over a perid of seven or eight years prior to his death.

RE-CROSS EXAMINATION.

When I was speaking of my father's habits in

respect to going to the office I did not have reference to that time that I was in the hospital, I had reference to a period of some seven or eight years. I believe I went to the hospital some time in November. Between the first of the year 1920 and up to the time that I went to the hospital, say the first [87] part of November, 1920, I do not know how often during a week in the first part of that year, my father went to the office. I did not live here all during that year; I was living in Fresno.

FURTHER RE-DIRECT EXAMINATION.

My father had a small office on the ground floor in one of his buildings located on San Pablo Avenue near 22nd Street, in Oakland.

MRS. FRANCES COIT, one of the defendants, called on behalf of the defendants, being first duly sworn, testified:

I am the daughter of William H. MacKinnon, the decedent in this case. At the time that he died I was living in his home; I lived there from May, 1919, until about 1922. As to my father's habits during that time with reference to his business, he went to his office nearly every day because I drove him. He left the house at different hours in the morning, probably ten or eleven o'clock, and he would come home at luncheon, and then go back probably at two o'clock. I was there at the time he died; I don't know just where I was in the house, I was not in the room, but I was in the house. At the time he died he was sitting up. I was not there at the time he delivered these deeds to my mother. I don't know where I was at the time, I was not at home.

I can't remember that I ever had any conversation during this period, either before or after he made these [88] deeds to my mother, as to the disposal of my father's property. He never discussed his business with me at all. He never discussed it with me after he deeded the property to my mother othe*n* than saying he had deeded the property. He said that at home, but I don't remember just when, it was before he died. I could not say definitely, but I think Doctor Kuder came in about the first of the year, I could not say definitely the dates, it was around the first of January. He was called in because my father was not feeling well. He did not prescribe, because my father and Dr. Kuder did not agree. I believe he prescribed for him afterwards; he came back and then he ordered a nurse. He ordered a nurse, I would say a week or ten days before my father died, anyhow, because when Dr. Kuder first came my father and Dr. Kuder disagreed, and Dr. Kuder said he would not doctor him if he did not do what he said; my father thought he could get up and go around in an automobile, and Dr. Kuder said no, if he was going to do that he would not be his doctor, and then a few days afterward my father called him in again, and when he ordered the nurse my father accepted his viewpoint. He only had one nurse. I do not know whether he contemplated a trip to Fresno just before he died. I received a check for a certain portion of this refund from the government.

MR. CARPENTER: I will stipulate that she received it and endorsed the check over to her mother.

MR. VAN FLEET: And that she did not benefit by any of the money?

MR. CARPENTER: Yes, I will stipulate to all of that. [89]

CROSS EXAMINATION.

My father was not in the habit of discussing his ailments with the members of his immediate family during his lifetime. I have no recollection of his being sick, other than having the gout, before. He had attacks of the gout quite frequently. I can't remember at this time whether he had the gout or whether it was a cold. When he had the gout he did not walk. He was walking this time that Dr. Kuder came in. Oh, yes, he was out then while Dr. Shannon was there during the month of December and prior to that time. I can't definitely say when was the last attack of the gout that he had. I could not say that he had any in 1920, the year before his death. I could not say definitely when he developed this cold. I know that before Christmas he had the cold, we did not think anything of his having it. He just complained of having a cold; I don't remember that he coughed; I know that he sneezed because he used to do that often. I think the cold seemed to get better, because he seemed to be fine Christmas day. My mother called Dr. Kuder. I think Dr. Milliken came in a few days before Christmas. He was the one that said he had a bad cold. He only came once, and then some friends came in after Christmas and spoke to father and said, "Well, why don't you see Dr. Kuder, he is a good doctor." We had not heard of him, or did not know him, or anything. I don't remember the last time we had Dr. Shannon, that seemed a long

time. Yes, I am sure that was away in the early part of December. Dr. Shannon was a friend, and he was there. During the month of December, my father did not go to the office every day, but he went to the office; I used to take him out, I used to [90] drive him around, but I would not say he went every day. I could not say how many times a week during that month he went to the office either; sometimes he would go out and not go near the office at all. That was true of the month previous, November. My brother was in the hospital then. Often we would go out and not go to the office at all. As far as I was concerned he kept his affairs pretty well to himself. I believed he discussed his affairs with my brothers, but he never did with me; I was never present when he did that, not that I can remember. Of my own knowledge I don't know that he ever did. I was there the last four days prior to my father's death; the nurse came in prior to that time; I can't remember *with* she did in connection with caring for my father, but I know he never wanted any body to wait on him. Those last four days he was not in bed during the day time; I never went into his room when he was in bed at night. He generally sat up later than I would; he most generally stayed up late, and there was generally someone in in the evening. I never had occasion to make his bed; he was not an early riser; he would get up at possibly nine o'clock; I really could not remember definitely if that is about the time he arose during those last four days. I was in the other end of the house and I could not answer as to whether he got up during the night after he went to bed. I cannot remember of the nurse giving

him any medicine at all. I saw her take his temperature; I believe it was in the morning and at night. I know that they kept a record of it there, kept a chart. I do not know what became of the chart. We always thought my father died of heart trouble. [91]

RE-DIRECT EXAMINATION.

I never contested after my father's death, this transfer to my mother. No one of the heirs did; I accepted it as a fact.

MRS. GEORGE MacKINNON, called as a witness on behalf of the defendants, being first duly sworn, testified:

I am the wife of George Mackinnon, who has testified here, and the daughter-in-law of William H. MacKinnon, who died in 1920. I remember the holidays of 1920 and 1921. I was up there with my father-in-law at that time. I was up there three or four times a week; in the evening we used to play cards; all along, ever since I have been married. I was there during the period between Christmas and New Years. I was there for dinner Christmas. W. H. was down to dinner, and was very jolly, and he sat at the table and carved the turkey, and he opened up wine for us, he wanted us to be happy, he seemed to be very jolly, there did not seem to be anything wrong with him, just the same as he always was. The last time I saw him was the night before he died. He was there, and my husband, and my mother-in-law and myself played cards with him. We played with him until, it must have been about eleven

o'clock, in fact, I wanted to go home, it kept me up too late. He did not discuss at that time any plans that he had; he wanted to go south with us, my husband and I went south an awful lot, we were going the following Monday, and he said he would like to go down with us. This conversation was the night before he died. We were playing cards—I am not sure if it was a week before he died when we were downstairs playing cards, or if [92] we were upstairs, I cannot recall where we were; we were playing cards, and he said he was going south with us; going to Fresno; we went to Fresno and Los Angeles a great deal, and he made many trips with us, and so mother got up to go and get some lemonade or something to drink, and while she was gone he turned to George and said, "George, I have given your mother some deeds," and George said, "You have, what made you do that?" And he said, "I want mother to have anything that I have, and I want her always to be happy and have something in her own name," so at that time mother came back, and that was all that was said.

CROSS-EXAMINATION

This conversation in this card game took place the night before he died. I was here in the courtroom when my husband testified and I heard him testify with reference to our playing cards with his father on the 16th of December. If my husband said it was the night of December 16 that his father mentioned at that time that he had deeded his property to his wife, I would be willing to *ex*cept that as being the date.

RE-DIRECT EXAMINATION.

I played cards with him the night before he died. I was up in his room just a few days before he died and talked to him. At that time, the night before he died, he was contemplating a trip to Fresno. He said he would like to go to Fresno with us. He said, "I will go with you," that is, go with my husband and myself. [93]

RE-CROSS EXAMINATION.

We were playing cards so much with him that I know it was the night before he died. I am quite sure. Mother and W. H. were up there, and Mr. Mackinnon—I always spoke of him as "W. H.," and my husband and myself. Mr. MacKinnon did not have his feet propped up at the time he was playing cards, he had big heavy slippers on. I did not look down at his feet; he had a card table in front of him he sat in a big immense leather chair. I am not positive it was a week before or the night before he died, but I am quite sure it was the night before he died. It was the week before, too, and then we went up on the following Sunday, when they called in the doctor, and I said, "What are you doing up here, W. H.?" This was the Sunday before he died, we went up there about one o'clock Sunday, and I said, "What are you doing up here, W. H.?" He was in his room in the house. I remember the night before he was downstairs, because I played cards with him. That was the Sunday before he died, a Saturday night. You see, he died on a Sunday. Well, the week before, Saturday night, I was up there playing cards,

and he was downstairs in the living room. And Sunday we went out about one o'clock and he was up in his bedroom sitting in a great, big chair, and we went up there and I said, "What are you doing up here, W. H.?" and he said, "What do you think that damn fool Doctor told me"—those were the very words he used—he hated doctors, and he had not any faith in them. He did not want them near him. I was not there when he called Dr. Kuder in. I never heard him have any conversations with Mrs. MacKinnon, his wife, relative to calling the doctor in. I never saw a nurse [94] there this last night that we were playing cards. I don't know whether she was out, or lying down. The last few days he did have a nurse, during that week.

MRS. FRANCES MACKINNON PUSEY, one of the defendants, called as a witness for the defendants, being first duly sworn, testified:

I am the widow of William H. MacKinnon. He did not hand me any deeds on December 20, it was December 16. They are acknowledged before a notary, Arthur E. Scott, on December 15. I know he was there, I don't know where he was but I know he was there. My husband did not hand me these deeds at that time, it was afterwards, the next day. That is all he said, "Frances, these are yours." And I put them in the drawer. Those are the deeds. I never gave them back to him. I locked them up in a drawer. After he died I gave them to Mr. DeLancey.

(The deeds were received in evidence and marked Defendants' Exhibit "G.")

I remember the 16th of December, 1920, when he turned the deeds over to me. During the year previous thereto he had spoken to me about deeding the property, I d*a*n't remember the date. It was long before six months before he deeded the property to me, it was long before that. That is all he said, "I will deed the property to you." I suppose he was waiting to get all the mortgages cleared off, something like that, I don't know. He never discussed much business with me, anyhow. At the time he turned this deed over to me he was not feeling very good. At the time he turned these deeds over to me he was in the ordinary state of health, except he had a cold. [95]

It was quite a while after he gave these deeds to me, I have forgotten what time the doctor was called in; I think some time in the latter part of December, but he did not come to see him every day. The doctor ordered a nurse; he didn't like a nurse. I could take care of him if anything was the matter with him, but the nurse came, the doctor ordered the nurse; he didn't want the nurse, and the doctor said he should have one. I was there the day he died; I was sitting along side of him when he died; he was sitting in a chair. I heard the testimony of Mrs. MacKinnon that she played cards with him the night before; they did, they played cards Saturday night; they played cards every night, he was very fond of cards. He was present at the Christmas dinner with all his family; he carved the turkey and poured the champagne. In this estate, I paid all the taxes to the goversnment, myself. When this money was returned by the government to the various heirs they had turned all of the money over to me.

MR. VAN FLEET: After your husband's death, in the year 1923, on the 24th of February, did you give a deed of trust for this property to the Central National Bank of Oakland? A. Yes.

MR. CARPENTER: I object to that on the ground that it does not come within the issues of this case. What she did two years after the decedent's death certainly cannot enter into the issues of this case, and I strenuously object to it.

THE COURT: I assume that this is in connection with your defense.

MR. VAN FLEET: Yes. [96]

THE COURT: For the present I will overrule the objection.

MR. CARPENTER: May I state the grounds of my objection? If it is offered for this equitable estoppel, I object to it on the ground that one of the elements, the necessary element to sustain that defense, is lacking, and it cannot possibly be supplied for reasons of law, and those that both parties, both the Commissioner of Internal Revenue and the administrators representing this estate, were in the same position as respects the law. There was not any mistake of fact on the part of the Commissioner in returning this money; it was a mistake of law, and since both parties were in the same condition, it does not make any difference that the Commissioner has reversed his position, and for that reason I make my objection, and we ask for a ruling on those grounds.

THE COURT: The objection will be overruled at this time.

MR. CARPENTER: Exception.

THE WITNESS: I did execute a deed of trust

to the Central National Bank of Oakland of the real property which my husband had conveyed to me. Yes, that is the deed of trust. That is my signature. That is the deed of trust which I executed to the Central National Bank of Oakland.

(The document was received in evidence and marked Defendants' Exhibit "H.")

MR. CARPENTER: May it be stipulated that the objection that I just made with reference to any evidence on the question of estoppel stand for all testimony that is introduced hereafter? [97]

MR. VAN FLEET: Yes, you may.

THE COURT: It will be so understood.

THE WITNESS: I executed mortgages on this property in the year 1926 in the sum of $67,000.00. Those are copies I remember executing those mortgages and signing them.

MR. VAN FLEET: We offer these in evidence. These are copies. You do not object to that?

MR. CARPENTER: No, it is understood that my objection runs to all of this testimony.

MR. VAN FLEET: Yes.

THE COURT: The objection will be overruled, and they may be admitted.

(The documents were marked "Defendants' Exhibit I.")

CROSS-EXAMINATION.

It is a fact that my husband was always contemplating trips, and particularly in the last year of his life. It was on his mind all the time. He never talked about his ailments to me. He sort of guarded himself

in that respect, so that I would not know that he was feeling badly. He was feeling all right at the time he made these deeds. I remember of testifying in a prior trial of this matter, an equity action.

MR. CARPENTER: Q. Do you remember at the time that this question was asked you, here: "Q. At the time that he made these deeds had he been home more than usual? A. Oh, yes, he was home then, he was not feeling good."

THE WITNESS: A. That is right.

MR. CARPENTER: Q. "Then he was home, but he went out pretty nearly every day until Dr. Kuder came." A. That is right. [98]

Q. "And then he did not go out." A. Yes.

THE WITNESS: At the time that he made the deeds he was not feeling as well as he generally did, but I had no idea of death, or anything like that; that thought never entered my head. I was mistaken when I testified a few moments ago that he was feeling well at the time that he made the deeds. I called Dr. Kuder. I do not remember his initials. I looked up the number in the 'phone directory but I don't know what building it was. I called Dr. Kuder because I thought he was not feeling so good, so I called in a doctor to see what he would say about it. I selected Dr. Kuder because I always heard that Dr. Kuder was a good doctor and Dr. Shannon was not there, he was away. I don't know for what purpose he was an especially good doctor; I guess he was a heart specialist. I did not know that my husband had heart trouble before Dr. Kuder came; he said he had; it never occured to me. He never complained of any pain around his heart. He never complained

about anything. He had a cold at the time but his cold was better. It hung on a long time, and that kind of worried me, too, but that got better. It hung on just a few months before his death. At the time that Dr. Kuder was there I don't know that my husband took any medicines; I called in a nurse after that and she attended to him; I was not always in the room; I was in there a good deal, but I think she gave him some kind of medicine. I think the nurse took his temperature regularly while she was there; that is what the nurse was there for; I kept her in there to watch him. He did not have any swelling on his toe. He had had gout, but he did not have it so bad at that time; he had had gout for about fifteen years. I did not hear my son William H. MacKinnon testify here that Mr. MacKinnon had his toe [99] wrapped up and there was a swelling on his toe. It used to swell, but he never had it wrapped up, as far as I know. For a long, long time. He used to have the gout very bad. There was no other part of his body that was troubled with swelling—his legs a little bit. I was in the room every day the last four days. No, when in bed he would not be propped up with a pillow; he sat in a chair a good deal. He was not in bed. When in bed he would not use many pillows, one or two. Mr. MacKinnon was quite a large man. He weighed two hundred and something when he died; I think he had weighed more than that. About 275 when he died, and he had weighed over 300. He was about five feet eleven, or five feet ten and a half, I don't know which. Prior to his death he had been confined to his bedroom probably a week or so, it might have been over that, I don't know. It might have been two weeks. During that time he did not

go downstairs, not after he went upstairs; he only went down once or twice, because the doctor forbade him to go down, told him to stay in his room. When he did go downstairs, I would see him. It was not an effort for him to go down, for a big man like him. He moved around very spry. He seemed to go up slower than he had a few months prior to that; he seemed a little weaker toward the last. Yes, I think he was a little short of breath when he got upstairs. He spent most of his time in the chair. He walked around, but the doctor forbade him to. He went in the bathroom. After the doctor came he forbade him to do that, he said, "You do as I tell you." After the doctor came, after the doctor forbade him not to go to the bathroom he would sit there in his chair all day. He would change off and sit in bed or lie in bed, during the day time. Not at any time [100] after the doctor came did I have any reason to believe that he was slightly delirious; he never was delirious; he always had a good mind. I was present the night before he died; I was always there. That was the night he played cards, Saturday night. My two sons and their wives and I were present—the nurse was in bed, I think, she was not there at that time. She was on 24 hour duty. She stayed all the time. She would stay in his room. I was not playing cards; my husband and my two sons and their wives were playing, George MacKinnon, and his wife, and my husband and the other son, William. I was in the room, but not playing. I play Hearts, but this was either Bridge or Whist, either one. That was the night he spoke of taking that trip to Fresno; he spoke of taking that trip the day he died. I did not think it was strange at all; he was feeling better at that time. I did not

give him any treatment during his last illness. I took care of him. I would not help him to dress; he dressed himself. I would bring up his meals to him. For the last week or so he had his meals in his room. He was not on a diet; he ate anything.

I don't know what treatment the nurse was giving him. He used the vibrator a long time, around here—on his chest too, I guess. I never used it. The nurse kept a chart. I don't know what became of it, I can't remember.

I did not pay any of the money back to the Commissioner of Internal Revenue. The deeds I spoke of I turned over to my son-in-law. After that time he recorded them. My husband always got up once or twice during the night; he had been doing that for several months. He always stayed up late, around eleven o'clock, sometimes later. He would get up any time he wanted to in the morning, around nine [101] o'clock, unless he wanted to go out some place, and then he would get up earlier. Between the hours of twelve and nine, the time that he was in bed he would awaken and get up and go to the bathroom, I don't know how many times. This cold that he had, that first came on him around the middle of December. I don't know when the last cold was he had prior to that; he had colds, but this one hung on; he had slight colds quite frequently, a sort of chronic cold.

S. BERVEN, called as a witness on behalf of the defendants, being first duly sworn, testified:

I am the assistant trust officer of the Central National Bank of Oakland.

MR. CARPENTER: Do you wish to introduce the bank account of the bank?

MR. VAN FLEET: No. I just want to show, in the line of my defense of estoppel, the income of the estate at the time that this deed of trust was made, and the income at the present time, as completing that defense.

MR. CARPENTER: I will stipulate that the trust deed was made.

MR. VAN FLEET: Very good; and that a mortgage was put on after the refund was paid.

MR. CARPENTER: I don't know as to that.

MR. VAN FLEET: That was put in this morning. Then I want to elicit what the present income of that real property is.

MR. CARPENTER: To all of which I, of course, object, I will stipulate that that will be his testimony, subject, however, to my objection as to its materiality on the [102] grounds mentioned in the objection that I made to Mrs. Pusey's testimony in that regard.

THE COURT: That will be the understanding, that this testimony goes in under the general objection.

THE WITNESS: Ever since March 6, 1924, when I went into the employ of the Central National Bank I have been in charge of the real property under this trust deed. I know the income from it.

MR. CARPENTER: May it be stipulated that my objection goes to all of this?

MR. VAN FLEET: Surely.

MR. CARPENTER: And it may be overruled and an exception noted?

THE COURT: That is the understanding.

THE WITNESS: I have brought with me my report to the Federal government, the fiduciary return of income. This was prepared for the different years

I had to report to the government. In 1923, of course, I did not have a full report, it was only covered from February 24, 1923, up to the time the trust was created. The income has decreased very materially since 1924. In other words, in 1924 the net income, after depreciation, was $9176.78. That was for the full year 1924; 1928 was the last report we made, last year, that was reduced down, after depreciation, to $2768.71, and I could figure how it is going this year.

Those figures were made by me, except the 1923 return. I started in 1924; 1924 is when I started to work for the Trust Company. That does not have a full report for the full year 1923, because it only came into our hands February 24, so we practically only have ten months to re- [103] port on. That was the reason I was mentioning 1924. In 1923, I might mention, for the ten months period, it was $6562.05. So 1923 and 1924 would be approximately practically the same. This year, providing the balance of the year stands up as it does so far, and figuring the same repairs, and insurance, and taxes—the taxes are going to be $117.56 for the full year—in other words, the amount that she is receiving now, less depreciation, would amount to about $3400.00 and some odd; this would be about $300.00 a month; that is what we are paying to Mrs. Pusey now under the trust deed, and it is practically principal money she is receiving this year.

I do not remember the exact date when the mortgage was put on this property; I remember it was put on. There were two pieces of property—this is why the income was reduced so much—there were two pieces of property on which the buildings were con-

demned by the City of Oakland, and we had to tear these buildings down and put new buildings up, and on another piece of property the fire destroyed the buildings, so that we had to put up a new building, and in order to put up a new building we had to raise the cash by a mortgage.

CROSS-EXAMINATION.

I account for the difference between the income as of the year 1924 and of this year, in the first place, real estate conditions the last two or three years—we have a piece of property, for instance, at the present time in Fresno, when the trust originally started, we had a lease there at the time on one piece of property from which we were getting $400.00 a month; then that was vacant for a long time, and finally we rented it, and are getting $200.00 a month, and we [104] were very fortunate to get it under the circumstances. That was one piece of property. Another piece of property we were getting a good income from, but the city condemned the building. Then we had to put a new building on there on which we do not get very much more rental, and then by putting this big mortgage on, there is interest, of course, increased taxes, and that reduces the income. Another piece of property fire destroyed, and that cut down the income over $2500.00 a year. So that changed conditions. These new buildings we put up, we looked for larger rentals from, naturally, on account of the investment we put into them. Those buildings were put up in 1926.

No, depreciation did not enter into this so as to reduce income. The depreciation has been taken right along, even on the old buildings and new buildings.

That was taken even before the fire, depreciation was taken right along, so that that would not enter into this any more after it than before.

There is another piece of property, consisting of four stores on Telegraph Avenue; that property is still in the same condition; we have been very fortunate with that property, it has been rented right along; I was just mentioning the reason for reduced rental. This other property on Telegraph Avenue, we have been receiving the rental right along, just as before. There is another piece of property that is practically vacant that we are getting a small income from. The reason I was pointing particular properties out was because they are the ones that affected the income.

The Fresno property would not be the only property affecting the income. The Fresno property and the 48th Street property destroyed by fire. On the Fresno property the income is reduced over one-half, and then the destroying [105] of this property by fire*d* reduced the income we were getting by $2500.00 a year, and then by the condemnation proceeding by the city, making us tear the building down, it reduced the income. In 1924, $400.00 a month rental was coming from the Fresno property, and $200.00 is coming from it now. The reason for the loss in income there is just general conditions; we had a lease on at that time at $400.00 a month, and when that was up we could not get anybody to rent it again at that price. I would not say that it was exactly that time when the grapes were in such high demand, because the lease was on at that time, and, naturally, they wanted to fulfill their lease. I do not know exactly just what time the lease was put on; I know it was on

at the time that I came into the Trust Department, in 1924. We were receiving the income at that time. I think I have seen that lease. I saw it at one time, but I do not remember the terms of it exactly right now; all I remember is we were getting $400.00 a month, and I reported it to the government. I could not say whether the bank made the lease of whether it was on at the time, I would not want to say. The general condition of the real estate market would enter into the reason for the income being reduced there; there seem to be more stores than you can rent over there; we have vacant stores there now.

In 1924, after taking depreciation, that is net, after paying taxes—yes we took depreciation on this Fresno property in the $400.00 a month. I might say the deprecation for 1924 was $3320.00. After taking off that amount we have a net income, after paying trustee's fees, and taxes, and all expenses, of $9176.78. That is for the entire property in this State. [106]

$400.00 a month was the income during 1924 from Fresno. The income from this property in Oakland that was burned out during 1924, I just gave it approximately as $2500.00 a year, but I could give you the exact amount. In 1924 we got $2808.35. There is no new building on that property, it is still vacant. The new building was put up at 22nd and San Pablo; that was property condemned by the city, two pieces of property, 37th and San Pablo, and 22nd and San Pablo. *The* is no income from the place that burned down, it is a vacant lot. About the place where the property was condemned the income from that property during 1924 was at 37th and San Pablo we got $3025.00. On the new buildings there now, we are getting $5100.00 a year, but, of course, the mort-

gage is against that, and we have to pay interest on that. The other condemned property at 22nd and San Pablo in 1924 was earning $4535.00. We put a new building on that and we are now getting $4680.00; we are not getting very much more, and we have to pay interest on the mortgage, and increased taxes. There are some vacancies there right now, but we expect to get higher income. This income that I just gave you, that is exclusive of the taxes that we are paying, that is the rental, gross rental.

RE-DIRECT EXAMINATION.

THE COURT: You have introduced in evidence some deeds, I would like to understand what is meant by what is known as the trust estate? Is that all of the property, or is there property remaining the widow after these other transfers? [107]

MR. VAN FLEET: All of the real property, as I understand it, in the trust estate, was deeded to her by her husband, which is practically all of the estate, except $126,000.00, and that consisted mostly of bonds and securities.

THE COURT: I mean does this property that this witness is speaking of include also the property that was supposed to be deeded to her sons and daughter, a granddaughter, that is, the other heirs?

MR. VAN FLEET: You mean deeds outright?

THE COURT: Yes.

MR. VAN FLEET: No, there is certain property that they have that was deeded outright, a small amount of property.

THE COURT: I am asking if it is included in what he has called the trust estate.

MR. CARPENTER: There is $126,000.00 that did not go into the trust estate.

MR. VAN FLEET: Yes.

THE COURT: Am I correct in understanding that the deeds you offered in evidence include the conveyances from the mother to the children?

MR. VAN FLEET: No, those deeds have not been offered in evidence. The deeds that are offered in evidence are the deeds that the husband made to the wife, and I also offered in evidence the deed of trust.

THE COURT: I did not know whether there was embodied in the trust also the conveyances to the children.

MR. VAN FLEET: No.

THE COURT: That is not part of the trust?

MR. VAN FLEET: No. [108]

GEORGE G. MacKINNON, recalled for the Defendants, testified as follows:

I received a check from the government for a portion of the refund. I endorsed it and turned it over to my mother. The property included in that deed of trust was all of the property which my father deeded to my mother before his death, except possibly $75,000 to $100,000 worth, which he deeded to the three children probably a year after his death. That was unimproved property that had no improvements on. It was situated in Alameda County and Fresno County, and there were a few small pieces of not much value in Los Angeles County.

MR. VAN FLEET: At this time, if your Honor please, I have these defenses that I call your Honor's

attention, to which really involve questions of law, but I want to complete my record, the defense that a determination of the Commissioner of Internal Revenue under which they made a re-audit of this property, and a review of the property, and determination that the claim for refund should be allowed,—the defense that that was final, and that on the question of mistake, there never having been a re-assessment within the four years provided by the statute, that there is not any mistake upon which they can sue. Simply to clear the record on that I want to offer in evidence that determination of the Internal Revenue Department, for the purpose of its form. Of course, it is admitted in the pleadings, but the form is what we rely upon to show that there was a final determination and agreement by the government, and this letter of August 3, 1925, of George G. MacKinnon, as to this refund. [109]

THE COURT: Hasn't that heretofore been offered and ruled upon?

MR. VAN FLEET: Yes, but you excluded that particular letter, for the reason that it was admitted by the pleadings.

MR. CARPENTER: I wish to object to the offer upon the ground that I thought that it was understood with counsel that all of the defenses, with the exception of the defence of equitable estoppel, and that the transfer was made in contemplation of death were decided upon by Judge Kerrigan, and that that would be the ruling of the case, in so far as counsel was concerned. However, I am ready to argue those matters. They are purely questions of law.

THE COURT: As I understand, counsel merely wants to preserve the record in the case. The objec-

tion will be sustained. I don't know that you completed the forming of your objection.

MR. CARPENTER: That is all right, as long as it was sustained.

MR. VAN FLEET: I take an exception, if your Honor please.

THE COURT: To preserve that in the record you had better have it identified in some way.

MR. VAN FLEET: I offer in evidence a letter of August 3, 1925, to George G. MacKinnon, and others, joint administrators of the Estate of William H. MacKinnon, deceased, signed by E. H. Blair, Commissioner of Internal Revenue, and identified as U. S. Exhibit No. 5, already in this case. It was admitted in that equity suit. For the purpose of my defense No. 3, and also my defense No. 4.

MR. CARPENTER: I object to it on the ground that it is admitted by the pleadings. Counsel came in with an [110] answer and admitted—

THE COURT: You do not need to argue it—

MR. CARPENTER: For that reason I object to it; it is merely burdening the record.

MR. VAN FLEET: I am offering it for the purpose of these defenses.

THE COURT: The objection is sustained.

MR. VAN FLEET: Exception.

For the same purpose I offer in evidence the notice of the adjustment of the claim for refund, which was received on November 2 by the heirs, and it is identified already as U. S. Exhibit No. 4, in this case, for the same purpose, to show that there was a final adjustment of the claim. That is my reason for offering it.

MR. CARPENTER: The same objection.

THE COURT: The objection will be sustained.

MR. VAN FLEET: Exception.

MR. VAN FLEET: I offer the opinion of the Attorney General of the United States, approved by the Secretary of the Treasury, under date of July 10, 1926, stating that the question of State tax be carried to the Supreme Court of the United States.

MR. CARPENTER: I assign counsel's argument as error, I take exception to that.

MR. VAN FLEET: I have a right to make my offer.

THE COURT: The Court understands what the offer is. The objection will be sustained.

MR. VAN FLEET: Exception. That is all.

MR. CARPENTER: If your Honor please, I wish to move at this time that all of the testimony as to the equitable estoppel be stricken, on the ground that I urged this morning, first, that the essential element that is necessary as [111] a matter of law cannot be shown, cannot be established here, and, second, that an additional essential element, that of damage, has not been proved. For that reason I move that all of the testimony be stricken as to that particular defense.

MR. VAN FLEET: I have the authorities here, if your Honor please, if you want to hear argument on the question.

THE COURT: I am going to excuse the jury for a few minutes and let you present that question.

(Thereupon the jury was excused and the point argued by counsel.)

The Court is of the opinion in this matter of estoppel that all of the evidence introduced in support of estoppel, giving it its strongest effect, is not sufficient to

establish an estoppel, and, for that reason, the Court will sustain the motion to strike, and will instruct the jury to disregard that evidence, and not to consider that portion of the defense relating to estoppel. This action will be taken in the presence of the jury, and you can preserve your record at that time, or you can take your exception now.

MR. VAN FLEET: I will take my exception now.

(After further argument.)

MR. CARPENTER: In view of your Honor's statement, I make a request that the complaint be considered amended so as to conform to the proof, and that the prayer of the complaint be amended to pray for judgment against the defendant, Mrs. Frances MacKinnon Pusey, only for the full amount, together with interest from the date that the checks were received by the defendant.

THE COURT: The request to amend will be granted. [112]

BERNARD KAUFMAN, called for the plaintiff in rebuttal; being first duly sworn, testified:

I am duly registered and licensed to practice medicine in the State of California. I am practicing medicine at the present time. I specialize in diseases of the heart. My education in that respect has been a period of postgraduate study in Europe, that is, at London, Paris and Vienna, over a period of six years. Prior to that time I practiced medicine in California, from 1909 to 1921. I held honorary positions in Europe in my work there. I was at one time vice-president of the American Medical Association in Vienna for one term, and two terms president of the American Medical Association in Vienna. During my

course of studies over there I had occasion to study diseases of the brain in connection with heart trouble.

MR. CARPENTER: Q. Doctor, will you give me the definition of fatty degeneration of the heart?

MR. VAN FLEET: I object to that as immaterial, irrelevant, and incompetent. There is no question in this case in regard to fatty degeneration of the heart.

MR. CARPENTER: I believe that counsel is mistaken in that respect. I will read the testimony of Dr. Shannon. (Reads.)

THE COURT: I think the objection goes to the weight, rather than the competency of the testimony. The objection will be overruled and an exception may be noted.

THE WITNESS: A. That is a diseased condition of the heart muscles, in which the normal constituents of the muscle fibres have undergone changes resulting in the development of fatty globules. Meaning that instead of the muscles of the heart being normal, that the muscles had undergone [113] chemical changes in which fatty substances developed within the muscle fibres, themselves.

MR. CARPENTER: Q. What are the symptoms of that disease?

MR. VAN FLEET: To which we make the same objection.

THE COURT: The objection will be overruled.

MR. VAN FLEET: Exception.

THE WITNESS: A. The symptoms can range from practically nothing up until the most marked conditions, for example, a person may, in the early stages of it, notice nothing other than a sense of oppression in the chest, a discomfort in the chest, or

he may notice at times, not constantly, but at times, the recurrence of such effects or signs of discomfort; then at other times he may notice a shortness of breath recurring at periods, interspersed with periods of perfect freedom from shortness of breath; such shortness of breath might occur at one period, under certain physical effort, and not at other physical efforts, or he may have definite pain, or he may have disturbance of digestion, or he may have swelling in his limbs, or he finally might have sudden death.

MR. CARPENTER: Q. Now, myocarditis, what is the definition of that?

MR. VAN FLEET: I object to that, there is no evidence of myocarditis in this case.

MR. CARPENTER: Your own doctor did on cross-examination.

MR. VAN FLEET: He gave you a definition, but he said he did not think it myocarditis.

MR. CARPENTER: He did not say anything of the kind.

THE COURT: The objection is overruled.

MR. VAN FLEET: Exception. [114]

THE WITNESS: A. Myocarditis is a pathological condition in the heart muscles as a result of a chronic inflammatory process, either within the heart muscles or the tissues surrounding the heart muscles. The symptoms are practically similar to those of fatty degeneration, both in respect of their gradual onset and in respect to their outcome.

MR. CARPENTER: Q. Now, with either of those diseases, would a man who died as a result of either of them be apt to know, prior to his death, that death was impending within the reasonably distant future?

MR. VAN FLEET: I object to that upon the ground it is not a proper hypothetical question, not based upon any facts in the case.

THE COURT: The objection is overruled.

MR. VAN FLEET: Exception.

A. In general, yes.

MR. CARPENTER: Q. For how long prior to his death?

MR. VAN FLEET: We make the same objection.

THE COURT: Overruled.

MR. VAN FLEET: Exception.

A. That would depend upon many factors, first of all upon the man's age, the more elderly the man the more insistent would be that feeling that he would have as to the threat of death, or impending death; he would naturally have a fear, as most people have, that with increase in age, there is a fatty degeneration of the heart muscles connected with it, and he would get a fear of impending death as a result of that increase in age.

Q. Would it be apt to extend over a period of a month or two prior to his death, with a man say 63 years of age?

A. In my experience I would say over a longer period. [115]

MR. CARPENTER: That is all.

MR. VAN FLEET: That is all.

MR. CARPENTER: If your Honor please, at this time I wish to move for a directed verdict on defendants' counter-claim in favor of the government.

THE COURT: The motion will be denied.

MR. CARPENTER: May I have an exception to the ruling?

THE COURT: Yes.

MR. CARPENTER: For the purpose of the record, I also move for a directed verdict in favor of the government on defendants' cause of action for money had and received.

THE COURT: The motion will be denied.

MR. CARPENTER: Exception.

One further motion; I move for a directed verdict on all of the issues in the case in favor of the plaintiff.

THE COURT: The motion will be denied.

MR. CARPENTER: Exception.

MR. VAN FLEET: At this time I wish to move for a directed verdict, first, on my second defense to the amended complaint here, that the amended complaint herein sets forth an entirely new, separate, and distinct cause of action from that set forth in the original complaint herein, and said cause of action is barred by subdivision (b) of Section 610 of the Revenue Act of 1928. That, of course, has already been passed upon by Judge Kerrigan.

I also move for a directed verdict upon the ground that there has only been on determination by the Commissioner of Internal Revenue, here, in refunding this money, and that that determination was final. That is my third defense. And there was never any assessment made within the four years [116] provided by Section 1322 of the Act of 1921, and any further determination is barred.

THE COURT: Denied.

MR. VAN FLEET: Exception.

I wish to move for a directed verdict against plaintiff upon the ground that the government, in this case, has not produced sufficient evidence to show that the defendants here have money which, in equity and good conscience, they should return to the government.

THE COURT: The motion will be denied.

MR. VAN FLEET: Exception.

I also wish to move for a directed verdict upon the ground that the evidence here shows that this transfer of the decedent William H. MacKinnon to his wife before his death was made in good faith, and not in contemplation of death, and took effect and enjoyment at once, and that there is no evidence on the part of the government contradicting that evidence, and there is really no evidence to go to the jury on, as a matter of law.

THE COURT: The motion will be denied.

MR. VAN FLEET: Exception.

I wish at this time to move for a directed verdict as to the defendants George G. MacKinnon, William H. MacKinnon, Jr., Frances MacKinnon Coit, and John S. Delancey, guardian of June MacKinnon Delancey, a minor; that there is no evidence here that they ever received money which, in equity and in good conscience, they should return to the government.

THE COURT: The latter motion will be granted. The motion for a directed verdict for all defendants other than Mrs. Pusey will be granted. [117]

MR. CARPENTER: Might I state the ground on which I based my motion for a directed verdict on the counterclaim? The ground is there is nothing in the record to show the value of the property or the tax on the property which was transferred in contemplation of death, as claimed by the government. That is, the defendants claim the property was not transferred in contemplation of death. In other words, there is no evidence here to show just exactly what the offset would be in the event that the defendants were entitled to recover on their counterclaim.

THE COURT: That motion relates to what we might call your first defense, with respect to the deed, does it not?

MR. CARPENTER: Yes.

THE COURT: The motion will be denied.

MR. CARPENTER: Exception.

THE COURT: At this time I think the record might show that the motion to strike the evidence with respect to the defense of estoppel is granted.

MR. VAN FLEET: To which I take an exception.

THE COURT: And the jury will be instructed to disregard that phase of the case.

CHARGE TO THE JURY.

THE COURT (orally): Gentlemen of the Jury: I will instruct you upon the law of the case. Generally, you are instructed that you are the sole judges of the evidence, and the credibility of the witnesses. The law you are to apply as given you by the court.

In determining the weight of the testimony and the credibility of the witnesses, you have a right to consider [118] the interest, if any, the witnesses may have in the result of the case, their appearance upon the witness stand, the manner in which they give their testimony. If you believe any witness has testified falsely upon any material matter, you have a right to reject all of the testimony of that witness, except as it may be corroborated by other credible testimony in the case.

In this case, two defenses have been set up, one of which relates to the matter of a conveyance, in view of impending death, concerning which I will instruct

you later. The other is in reference to a defense in the nature of an equitable estoppel. The court has heretofore determined as a matter of law, from the testimony upon that phase of the case, that the evidence was insufficient to go to the jury, and upon that matter you are instructed to disregard that element of the case. You are also instructed to disregard any evidence in any matter where the evidence, upon motion, has been stricken. You are also instructed that arguments by counsel upon the facts of the case are designed to aid the jury in weighing the testimony; however, you are instructed that those are mere matters of argument, and that your final determination must be based upon the evidence in the case, and upon the evidence alone.

You are instructed that by the provisions of an Act of Congress entitled "An Act to Provide Revenue, and for Other Purposes," approved February 24, 1919, and commonly known as the Revenue Act of 1918, a federal tax was payable on estates of deceased persons; that in pursuance of such statute, a tax levied on the Estate of William H. Mackinnon, who died January 16, 1921, was paid in the total sum of $13,359.85; that after such payment, and on or about [119] October 31, 1923, a claim for a refund in the amount of $9899.94 was made upon the ground, among others, that only one-half of the community property of the decedent and his wife should be included in the decedent's gross estate; that thereafter the Commissioner of Internal Revenue conceded the contention for refund upon the ground that only one-half of the said community property should be included in the gross estate, and allowed a refund of $9438.66, with interest thereon in the sum of $1848.44; that thereafter, and

on or about the 2nd day of November, 1925, there was paid to the several defendants upon such refunds a total amount of $11,287.10, one-half of which amount was paid directly to the defendant, Frances Mackinnon Pusey, the surviving widow of the decedent, and the remaining half in equal amounts by checks to the other four defendants, who endorsed said checks and delivered the same to the defendant Frances Mackinnon Pusey, who received the money paid thereon.

You are instructed that the total gross estate of the said William H. Mackinnon was subject to the estate tax, and that the refund payments were occasioned by a mistake of law, and that the plaintiff is entitled to recover such payments from the defendant, Frances Mackinnon Pusey as money had and received, unless you find from the evidence that the defendants have established their alleged separate defense and counterclaim as set up in their amended answer.

You are instructed that the Revenue Act of 1918 was applicable when the transfers involved in this case were made. Under the provisions of that law, a transfer of a material part of deceased's property made without a fair consideration in money or money's worth, if made within two years of his [120] death, is presumed to be made in contemplation of death, and is taxable. The undisputed evidence in this case shows that the decedent, William H. Mackinnon, made a transfer of the bulk of his property to his wife as a gift within the month preceding his death. I therefore instruct you that these transfers are presumed to have been made in contemplation of death, and are presumed to be taxable. The burden of proof is on the defendants to show the contrary.

I instruct you that the finding of the Commissioner of Internal Revenue on the amount of a tax is presumed to be correct, and the burden is upon the defendants to show that it is not correct.

You are instructed that the burden of proof in this case is upon the defendants to show that transfers of property, and each of them, made by William H. Mackinnon to his wife, were transfers not made by William H. Mackinnon in contemplation of death; and if the defendants are unable to prove that said transfers, and each of them, were not made in contemplation of death, your verdict on defendant's counterclaim should be for plaintiff.

If you find that William H. Mackinnon made the transfers in question in contemplation of his death, then your verdict should be for the plaintiff, and against the defendant, Frances MacKinnon Pusey, for $11,287.10, together with interest thereon at 7 per cent per annum from October 19, 1925, to the present time.

You are instructed that one of the defenses of the defendants herein is that the defendants are entitled to keep the money sued for by the government herein in equity and good conscience, for the reason that there was a bona fide transfer of the real property by the said William H. [121] Mackinnon, deceased, to his wife, Frances Mackinnon Pusey, defendant herein, before his death, to-wit, on or about the 15th day of December, 1920; that said transfer consisted of deeds of gift by said William H. Mackinnon, deceased, to his wife, for a valuable consideration, of real property situate in the County of Alameda, County of Fresno, County of Los Angeles, in the State of California; that said deeds of gift were made

in good faith, and not in contemplation of death, and were intended to take effect in possession and enjoyment immediately during the lifetime of the decedent, William H. Mackinnon.

The burden is upon the defendants to establish these facts. If you find from the evidence that these deeds of gift were made in good faith, and not in contemplation of death, and were intended to take effect in possession and enjoyment immediately during the lifetime of the decedent, then your verdict should be for the defendants in this case.

It becomes necessary to instruct you, before you can determine this case to your satisfaction, as to the meaning of the words, "in contemplation of death," as that phrase is used in the statute. The language referred to was not intended to include that general expectation of death which is the essential concomitant of the inherent knowledge of the inevitable termination of all life, and which is in the young and physically robust as in the aged and the infirm. A reasonable and just view of the law in question is that it is only where the transfer of property by gift is immediately and directly prompted by the expectation of death, that the property so transferred becomes amenable to the burden of the tax. In other words, it is only when contemplation of death is the motive, without which the convey- [122] *ance* would not be made, that a transfer may be subjected to the tax. The meaning is restricted to that state of mind which by reason of advance age, serious illness, or other producing cause, induces the conviction that death in the near future is to be anticipated. But if the transfer is made with other motives and for other causes, it is not taxable, no matter when made. A

transfer is made in contemplation of death if the expectation or anticipation of death in either the immediate or reasonably near future is the moving cause of the transfer.

You have been instructed that under the Revenue Act of 1918 any transfer of the decedent's property, as in the case at bar, made by the decedent, within two years prior to his death, is, unless shown to the contrary, presumed to have been made in contemplation of death. A transfer within that period raises a presumption that the gifts were made in contemplation of death. This is a presumption raised by the law in the absence of evidence of a convincing nature by the defendants herein. The only legal effect of this presumption is to cast upon the defendants herein the burden of proving by satisfactory evidence the contrary. When that is done, the presumption is at an end, and the question as to whether these deeds were made in contemplation of death is one for the jury to determine upon all the evidence. Therefore, if you determine upon all the evidence that these deeds were not made in contemplation of death, as I have defined it to you, your verdict should be for the defendants herein.

You are instructed that the fact, alone, that William H. Mackinnon died within a month of the transfer to his wife, is not proof that the transfer was made in contemplation of [123] death. In spite of that fact, he could still have given the property in good faith, and at a time when he had no expectation or anticipation in either the immediate or reasonably distant future.

In considering the evidence in this case to determine whether the transfers were made in contemplation of

death, you have a right to consider all of the facts that have been submitted to you by the various witnesses upon either side of the case; you may consider the age, the condition of health, and all such matters in evidence which may appeal to you in determining the one sole question which is finally submitted to you in this case: Were the transfers of the real property shown by the deeds offered in evidence at the time of their execution and delivery, made by the decedent in contemplation of death?

Two forms of verdict will be submitted to you. One form will read, "We, the jury, find against the defendant Frances MacKinnon Pusey and in favor of plaintiff in the sum of $11,287.10 with interest at 7 per cent per annum from the 2nd day of November, 1925, (blank) Foreman."

The other form of verdict will read, "We, the jury, find for the defendant in the above entitled case, (blank) Foreman."

When you have agreed upon a verdict, you will have one or the other of those forms signed by your foreman and returned into court. Twelve of your number is necessary to agree upon a verdict.

Those are all of the instructions. If counsel desire to take any exceptions they may do so at this time.

MR. VAN FLEET: If your Honor please, in order to complete the record, I, at this time, desire to except to [124] the particular part of the general charge given to the jury regarding equitable estoppel; that particular part of the charge in which your Honor instructed the jury that the refund was a mistake.

I also except to the failure of your Honor to give

defendant's instruction No. 1 and defendant's instruction No. 8.

MR. CARPENTER: Merely for the purpose of the record, plaintiff excepts to that portion of the instructions which related to a statement of the plaintiff being entitled to recover on the theory of money had and received, unless—we except to that portion of the instructions containing the words which follow, "Unless," on the ground that we claim there is not sufficient evidence here to establish the defense.

(The portion of said instruction referred to reads as follows: "Unless you find from the evidence that the defendants have established their alleged separate defense and counter claim as set up in their amended answer.")

We also wish to except to that portion of the instructions which relate to—were the deeds made in good faith, and not in contemplation of death—we except to the including of the words "good faith" for the reason, as we urege, that there was no question at issue as to whether these were made in good faith.

(The portion of said instruction referred to reads as follows: "If you find from the evidence that these deeds of gift were made in good faith, and not in contemplation of death, and were intended to take effect in possession and [125] enjoyment immediately during the lifetime of the decedent, then your verdict should be for the defendants in this case.")

We further except to that portion of the instructions which related to the definition of the phrase "in contemplation of death," particularly to that portion starting with the words that it is restricted to persons of advanced age.

(The portion of said instruction referred to reads

as follows: "The meaning is restricted to that state of mind which, by reason of advance age, serious illness, or other producing cause, induces the conviction that death in the near future is to be anticipated.")

We further wish to except to the failure to give the definition as set forth in plaintiff's proposed instruction No. 5.

(Plaintiff's Proposed Instruction No. 5, reads as follows: "For a transfer to be 'in contemplation of death,' it is not necessary that the transferrer be in fear of immediate death. The phrase 'transfer in contemplation of death' for the purpose of this case means, a transfer of property, the transferrer having in mind the general expectancy of death which ordinarily acuates one in the execution of his will.")

THE COURT: The exceptions may be noted. The jury may now retire.

(Thereupon the jury retired, and subsequently came into court with a verdict in favor of the defendants.)

[126]

ORDER APPROVING AND SETTLING BILL OF EXCEPTIONS.

The foregoing bill of exceptions is duly proposed and is correct in all respects, and is hereby approved, allowed and settled and made a part of their record herein, and said bill of exceptions may be used by either parties plaintiff or defendant, upon any appeal taken by either parties plaintiff or defendant.

Dated: February 28th, 1930.

FRANK H. NORCROSS,
United States District Judge.

[Title of Court and Cause.]

AFFIDAVIT OF SERVICE OF PLAINTIFF'S PROPOSED BILL OF EXCEPTIONS.

United States of America,
State and Northern District of California,
City and County of San Francisco.—ss.

MARIE L. DUGUID, being duly sworn, deposes and says: I am and was at the time of the service of plaintiff's proposed bill of exceptions, a citizen of the United States over the age of 21 years, and not a party to the within entitled action; I personally served the within proposed bill of exceptions on Carey Van Fleet, Esq., attorney for defendants herein on February 8, 1930, by delivering to and leaving with said Carey Van Fleet personally in the Mills Building, in the City and County of San Francisco, in the Southern Division of the Northern District of California, a true copy of said proposed bill of exceptions.

MARIE L. DUGUID.

Subscribed and sworn to before me this 10th day of February, 1930.

(Seal) J. A. SCHAERTZER,
Deputy Clerk, U. S. District Court.
Northern District of California.

Service of the within Proposed Bill of Exceptions by copy admitted this ..... day of February, 1930.

.....,
Attorneys for Defendants.

I protest against the filing of the within Bill as not being in time.

CAREY VAN FLEET,
Attorneys for Defendants.

Dated February 8, 1930.

[Endorsed]: Filed: February 10, 1930. [127]

[Title of Court and Cause.]

NOTICE OF MOTION.

To UNITED STATES OF AMERICA, plaintiff herein, and GEORGE J. HATFIELD, its attorney:—

You and each of you, will please take notice that on Monday, the 10th of February, 1930, at the hour of 10 o'clock a. m., or as soon thereafter as counsel can be heard, in the courtroom of the above-entitled court, in the Postoffice Building, at 7th and Mission Streets, in San Francisco, California, defendants herein, by their attorney, Carey Van Fleet, will move to set aside the order of the above court, entered on the 27th day of January, 1930, extending the time and the term within which to serve, file, settle and sign a bill of exceptions herein, upon the grounds set forth in the accompanying motion.

CAREY VAN FLEET,
Attorney for defendants.

[Title of Court and Cause.]

MOTION.

Now comes the defendants herein and move to set aside the order herein entered on the 27th day of January, 1930, extending the time and the term within which a bill of exceptions may be served, filed, settled and signed, upon the ground that said order was (1) inadvertently made; (2) without the consent of defendants, (3) without jurisdiction, (4) is violative of the rules of this court, (5) and of the ruling of the Supreme Court of the United States, and the Circuit Court of Appeals, and is null and void.

CAREY VAN FLEET,
Attorney for defendants. [128]

Rules and Authorities.

Rule 8 of this court;
Rule 32 of this court;
Rule 45 of this court;
O'Connel vs. *U. S.,* 142-148.
Manufacturers Products vs. *Butterworth-Judson Company,* 258 U. S., 365-369.
Cavana vs. *Addison Miller,* 9th Circuit, 18 Fed. 2nd, 279.
Anderson vs. *U. S.,* 9th Circuit, 269 Fed., 65.
Maryland Casualty Co. vs. *Citizens Nat. Bank,* 9th Circuit, 8 Fed. 2nd, 216, 218.
Due service and receipt of a copy of the within

Notice of Motion is hereby admitted this 4th day of February, 1930.

GEO. J. HATFIELD,
Attorney for U. S.

[Endorsed]: Filed Feb. 4, 1930. [129]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 13th day of February, in the year of our Lord one thousand nine hundred and thirty.

PRESENT: the Honorable Frank H. Kerrigan, District Judge.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANCES MacKINNON PUSEY, et al.,

Ordered that the motion of defendant to set aside order heretofore made, extending the time and Term within which Plaintiff might file Bill of Exception, be and the same is hereby denied.[130]

[Title of Court and Cause.]

NOTICE OF MOTION TO STRIKE BILL OF EXCEPTIONS.

To United States of America, plaintiff herein, and George J. Hatfield, its attorney:

You and each of you will please take notice that on Monday, the 17th day of February, 1930, at the hour of 10 o'clock a. m. or as soon thereafter as counsel can be heard in the Court room of the above-entitled court, in the Postoffice Building at 7th and Mission Streets, in San Francisco, California, defendants herein by their attorney, Carey Van Fleet, will move to strike from the files plaintiff's Proposed Bill of Exceptions filed on February 10th, 1930, upon the grounds set forth in the accompanying motion.

CAREY VAN FLEET,
Attorney for Defendants.

[Title of Court and Cause.]

MOTION TO STRIKE BILL OF EXCEPTIONS.

Now come the defendants herein and move to strike plaintiff's Proposed Bill of Exceptions from the files herein upon the grounds and for the reasons that said Proposed Bill of Exceptions were not presented and filed within the time and the term as provided by law or any valid extension thereof to-wit:

The judgment herein became final October 18, 1929,

Appeal therefrom allowed January 17th, 1930,

Term for settling bill of exceptions began October 1st, 1929, and expired January 1st, 1930. Rule 8.

By stipulation and order entered on October 14th, 1929, the time to settle the Bill of Exceptions was extended beyond [131] the term until January 29th, 1930,

No further order was made within the extended term, but on January 27th, 1930, without consent of the defendants a further order was made extending the July 1929 term until the March term 1930, within to settle the Bill of Exceptions.

This last order is void as the court has lost jurisdiction as both the term and the extension thereof under Rule 8 had expired, otherwise Rule 8 and Rule 32 are of no avail.

CAREY VAN FLEET,
Attorney for Defendants.

Due service and receipt of a copy of the within Notice of Motion, etc., is hereby admitted this 14th day of February, 1930.

GEO. J. HATFIELD.

[Endorsed]: Filed Feb. 14, 1930. [132]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 17th day of February, in the year of our Lord one thousand nine hundred and thirty.

PRESENT: The Honorable Frank H. Kerrigan, District Judge.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANCES MACKINNON PUSEY, et al.,
Defendants.

After hearing Carey Van Fleet, Esq., attorney for defendant, it is ordered that motion of defendants to strike from files plaintiff's proposed bill of exceptions be denied and exception entered. [133]

[Title of Court and Cause.]

NOTICE OF PRESENTATION OF PROPOSED BILL OF EXCEPTIONS FOR SETTLEMENT.

To the defendants above named and to Carey Van Fleet, Esq., their attorney:

You, and each of you, will please take notice that on Tuesday, the 25th day of February, 1930, at the hour of 10:00 A. M., or as soon thereafter as counsel can be heard in the courtroom of the above entitled court, Post Office Building, 7th and Mission Streets, San Francisco, California, plaintiff will present its proposed bill of exceptions to the trial judge through the Honorable Frank H. Kerrigan for settlement.

Dated: February 19, 1930.

GEO. J. HATFIELD,
United States Attorney, Attorney for Plaintiff.

[Endorsed]: Filed Feb. 19, 1930. Service of the within Notice by copy admitted this 19th day of February, 1930.

CAREY VAN FLEET,
Attorney for Defendants.
WALTER B. MALING,
Clerk.
By R. M. GREEN,
Deputy Clerk. [134]

[Title of Court and Cause.]

NOTICE OF PROTEST AGAINST SETTLING, SIGNING AND CERTIFYING BILL OF EXCEPTIONS.

To United States of America, plaintiff herein, and George J. Hatfield, its attorney:

You and each of you will please take notice that on Tuesday, the 25th day of February, 1930, in the courtroom of the above entitled court at the hour of 10 o'clock a. m. or as soon thereafter as counsel can be heard, the defendants herein by their attorney, Carey Van Fleet, will protest against the settling, signing and certifying of the Bill of Exceptions in this case upon the grounds in the accompanying protest.

CAREY VAN FLEET,
Attorney for Defendants.

[Title of Court and Cause.]

PROTEST AGAINST SETTLING, SIGNING AND CERTIFYING BILL OF EXCEPTIONS.

Defendants, by their attorney, Carey Van Fleet, protest against the settling, signing and certifying of the Bill of Exceptions in this case upon the ground that the court has lost jurisdiction to settle, sign and certify said Bill, as the same was not presented during the term at which the judgment was entered or during any valid extension thereof and that all legal times,

periods and terms have expired for settling, signing and certifying the same.

Rule 8 of this court.

Rule 32 of this court.

Rule 45 of this court.

CAREY VAN FLEET,
Attorney for Defendants.

Receipt of a copy of the within Notice of Protest is hereby admitted this 19th days of February, 1930.

GEO. J. HATFIELD.

[Endorsed]: Filed Feb. 19, 1930. [135]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 25th day of February, in the year of our Lord one thousand nine hundred and thirty.

PRESENT: the Honorable Frank H. Kerrigan, District Judge.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANCES MACKINNON PUSEY, et al.,
Defendants.

This case came on regularly this day for hearing of the application for the settlement of the Bill of

Exceptions upon Appeal herein and the Opposition, thereto. Chellis M. Carpenter, Assistant U. S. Attorney, appearing as attorney for the United States. Carey Van Fleet, Esquire, appearing as attorney for Defendants. After hearing Counsel, the Court ordered that said matters be and are ordered submitted to Hon. Frank H. Norcross for consideration and determination. Further ordered that the orders of this Court entered herein on February 10, 1930, February 13, and February 17, 1930, be and the same are hereby vacated, set aside and held for naught and that the matter therein involved, to-wit: Motion of defendants to set aside order extending time and Term within which Plaintiff might file Bill of Exceptions and motion of defendants to strike from files Plaintiff's proposed Bill of Exceptions—be and the same are hereby ordered submitted to the said Honorable Frank H. Norcross, for consideration and determination. [136]

[Title of Court and Cause.]

ORDER DENYING DEFENDANT'S MOTIONS TO SET ASIDE ORDER EXTENDING TIME FOR BILL OF EXCEPTIONS; TO STRIKE BILL OF EXCEPTIONS; AND OVERRULING PROTEST AGAINST SETTLING, SIGNING AND CERTIFYING OF BILL OF EXCEPTIONS.

Defendant's motion, filed February 4, 1930, to set aside the order herein entered on the 27th day of January, 1930, extending the time and term within

which a Bill of Exceptions may be served, filed, settled and signed; and defendants' motion, filed February 14th, 1930, to strike plaintiff's proposed Bill of Exceptions from the files; and defendants' protest against the settling, signing and certifying of the Bill of Exceptions in this cause, having been submitted to the Court for decision, and the Court being fully advised in the premises,

It Is Ordered that each of said motions be, and the same hereby is, denied; and that said protest be, and the same hereby is, overruled.

Dated this 28th day of February, 1930.

FRANK H. NORCROSS,
District Judge.

[Endorsed]: Filed March 3, 1930. [137]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 11th day of March, in the year of our Lord one thousand nine hundred and thirty.

PRESENT: the Honorable Frank H. Kerrigan, District Judge.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANCES MACKINNON PUSEY, et al.,
Defendants.

On motion of Carey Van Fleet, Esq., attorney for defendant, it is ordered that an exception be entered to the Order filed herein on March 3, 1930, denying defendants Motion to set aside Order extending time for Bill of Exceptions; to strike Bill of Exceptions and overruling protest against settlement, signing and certifying of Bill of Exceptions. [138]

[Title of Court and Cause.]

PETITION FOR APPEAL.

The United States of America, plaintiff in the above entitled action, by and through Geo. J. Hatfield, United States Attorney for the Northern District of California, feeling itself aggrieved by the judgment entered on the 18th day of the October, 1929, in the above entitled proceedings, does hereby appeal from the said judgment to the Circuit Court of Appeals for the Ninth Circuit, and prays that its appeal may be allowed, and that a transcript of the record of proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: January 17, 1930.

GEO. J. HATFIELD,
United States Attorney, Attorney for Plaintiff.

[Endorsed]: Filed Jan. 17, 1930.

WALTER B. MALING,
Clerk. [139]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

COMES NOW the United States of America, plaintiff in the above entitled action, being the appellant herein, by Geo. J. Hatfield, United States Attorney for the Northern District of California, and in connection with its petition for appeal herein and the allowance of the same, assigns the following errors which it avers occurred at the trial of said cause, and which were duly excepted to by it and upon which it relies to reverse the judgment herein:

I.

The counterclaim set forth in defendants' amended answer to plaintiff's amended complaint, does not state facts sufficient to constitute a counterclaim. [140]

II.

That the court has no jurisdiction of the subject matter of the claim set forth in defendants' amended answer to plaintiff's amended complaint as a counterclaim.

III.

The court erred in overruling the demurrer interposed by the plaintiff to the first, further and separate defense and counterclaim which defendants have attempted to set forth on Pages 3 and 4 of the amended answer to plaintiff's amended complaint.

IV.

The court erred in denying plaintiff's motion for directed or instructed verdict at the close of all the evidence in said cause, upon the following grounds, to-wit:

1. On the ground that the evidence in this case had not established a *prima facie* case of counterclaim and was legally insufficient to sustain a verdict, and

2. On the ground that the evidence in this case was such as a matter of law to entitle plaintiff to a directed verdict on all the issues in the case.

To which ruling of the court plaintiff duly and regularly excepted.

V.

The court erred in denying plaintiff's motion for a directed verdict on defendants' counterclaim upon the ground that the evidence in the case thereon had not established a *prima facie* case on counterclaim and was legally insufficient to sustain a verdict for the reason that no evidence was introduced showing that the claim set forth in [141] said counterclaim was ever presented to the accounting officers of the Treasury as required by Section 951 Revised Statutes (28 U. S. C. 774), and no evidence was offered to show that the defendants, or any of them, were, at the time of the trial, in possession of vouchers or other documents not before in their power to procure, and/or were prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or for any other cause whatsoever; to which ruling of the court plaintiff duly and regularly excepted at the time of the trial herein.

VI.

The court erred in denying plaintiff's motion for a directed verdict at the close of all the evidence in said cause on plaintiff's cause of action for money had and received, on the ground that the evidence in this cause was such, as a matter of law, to entitle plaintiff to a verdict thereon; to which ruling of the court plaintiff duly and regularly excepted at the time of the trial herein.

VII.

The court erred in giving the last portion of the following instruction:

"You are instructed that the total gross estate of the said William H. Mackinnon was subject to the estate tax, and that the refund payments were occasioned by a mistake of law, and that the plaintiff is entitled to recover such payments from the defendant, Frances Mackinnon Pusey as money had and received, unless you find from the evidence that the defendants have established their alleged separate defense and counter-claim as set up in their amended answer."

beginning with the words, "unless you find" and reading as follows:

"unless you find from the evidence that the defendants have established their alleged [142] separate defense and counter claim as set up in their amended answer."

To which the plaintiff duly and regularly excepted at the time of the trial herein.

VIII.

The court erred in giving the last sentence of the following instruction:

"You are instructed that one of the defenses of the defendants herein is that the defendants are entitled to keep the money sued for by the Government herein in equity and good conscience, for the reason that there was a bona fide transfer of the real property by the said William H. Mackinnon, deceased, to his wife, Frances Mackinnon Pusey, defendant herein, before his death, to wit, on or about the 15th day of December, 1920; that said transfer consisted of deeds of gift by said William H. Mackinnon, deceased, to his wife, for a valuable consideration, of real property situate in the County of Alameda, County of Fresno, County Los Angeles, in the State of California; that said deeds of gift were made in good faith, and not in contemplation of death, and were intended to take effect in possession and enjoyment immediately during the lifetime of the decedent, William H. Mackinnon.

"The burden is upon the defendants to establish these facts. If you find from the evidence that these deeds of gift were made in good faith, and not in contemplation of death, and were intended to take effect in possession and enjoyment immediately during the lifetime of the decedent, then your verdict should be for the defendants in this case."

beginning with the words "If you find" and reading as follows:

"If you find from the evidence that these deeds of gift were made in good faith, and not in contemplation of death, and were intended to take effect in possession and enjoyment immediately during the lifetime of the decedent, then your verdict should be for the defendants in this case."

To which the plaintiff duly and regularly excepted at the [143] time of the trial herein.

IX.

The court erred in giving the last portion of the following instruction:

"It becomes necessary to instruct you, before you can determine this case to your satisfaction, as to the meaning of the words 'in contemplation of death', as that phrase is used in the statute. The language referred to was not intended to include that general expectation of death which is the essential concomitant of the inherent knowledge of the inevitable termination of all life, and which is in the young and physically robust as in the aged and the infirm. A reasonable and just view of the law in question is that it is only where the transfer of property by gift is immediately and directly prompted by the expectation of death, that the property so transferred becomes amenable to the burden of the tax. In other words, it is only when contemplation of death is the motive, without which the conveyance would not be made, that a transfer may be subjected to the tax. The meaning is restricted to that state of mind which, by reason of advance age, serious illness, or other producing cause, induces the conviction that death in the near future is to be anticipated. But if the transfer is made with other motives and for other causes, it is not taxable, no matter when made. A transfer is made in contemplation of death if the expectation or anticipation of death in either the immediate or reasonably near future is the moving cause of the transfer."

beginning with the words "The meaning is restricted" and reading as follows:

"The meaning is restricted to that state of mind

which, by reason of advance age, serious illness, or other producing cause, induces the conviction that death in the near future is to be anticipated."

To which the plaintiff duly and regularly excepted at the time of the trial herein. [144]

X.

The court erred in refusing to give the following instruction to the jury, which said instruction was duly presented to the court as "Plaintiff's Proposed Instruction No. 5";

"For a transfer to be 'in contemplation of death' it is not necessary that the transferror be in fear of immediate death.

"The phrase 'transfer in contemplation of death' for the purpose of this case means, a transfer of property, the transferrer having in mind the general expectancy of death which ordinarily actuates one in the execution of his will."

To which the plaintiff duly and regularly excepted at the time of the trial herein.

XI.

The court erred in overruling the objection of plaintiff to the following questions propounded to the witness George G. Mackinnon by attorney for defendants:

"MR. VAN FLEET: Q. Well, at that time, knowing the date when he paid off the mortgage,—do you remember that date?

"A. I don't recall it—it was sometime during the year—the latter part—I think it was in November, 1919.

"Q. Well, what did he state to you at that time and who was present?

"A. I don't think anybody was present, except he and I.

"Q. And what did he state to you at that time?

"A. That as soon as he got all the properties clear—

"MR. CARPENTER: Just a moment. I object to that on the ground that it is too far remote in point of time to show the condition of the testator's mind.

"MR. VAN FLEET: Well, it was in November, 1919.

"MR. CARPENTER: And he died in 1921.

"MR. VAN FLEET: He died in 1921, yes. [145]

"MR. CARPENTER: And the transfer was made a month before his death.

"MR. VAN FLEET: And we can show the course of his mind, of his intention, in the testator's mind for several years back, under the authorities.

"MR. CARPENTER: I take issue with you on that.

"THE COURT: Objection overruled.

"MR. CARPENTER: Exception.

MR. VAN FLEET: Q. And what was that conversation?

A. And he intended to deed certain properties to my mother.

MR. CARPENTER: I object and ask that the answer be stricken out, and I ask that the witness be instructed to state just what the conversation was, not give his conclusion of what it was.

THE COURT: The answer may go out; and state the conversation, as near as you can recall it, just what he said.

THE WITNESS: Well, he told me that he intended, after certain things were cleaned up, to deed certain properties to my mother. He had been telling me that for ten years.

MR. VAN FLEET: That last may go out, if your Honor please.

THE COURT: With respect to telling him that for ten years, that may go out, and the jury is instructed to disregard it."

XII.

The court erred in overruling the objection of plaintiff to the following testimony by the witness George G. Mackinnon, relative to the state of mind of the deceased subsequent to December 15, 1920, (at which time the transfer in issue was made):

"MR. VAN FLEET: Was he complaining of his health at that time?

A. He never said anything to me about his health. [146]

Q. At about that time were you contemplating a trip with your father?

A. Yes, I was contemplating a trip. He wanted me to take him on a trip.

Q. Where to? A. Fresno.

Q. And just what time was this?

A. I was playing cards with him on Saturday night, on the 15th day of January up to half past 11 at night and then he made arrangements for me to take him to Fresno on the following Monday.

MR. CARPENTER: If your Honor please, I ask that the testimony as to his state of mind subsequent to December 15, 1920, be stricken. The

witness is now testifying to the deceased's actions in January, just prior to his death.

MR. VAN FLEET: Well, under the authorities, if your Honor please, the declarations of the donor and the circumstances surrounding the gifts can be made both before and after the transfer. They are both admissible, both before and after the transfer.

THE COURT: That is more with respect to his health rather than state of mind at that time. The objection will be overruled.

MR. CARPENTER: Exception."

XIII.

The court erred in overruling the objection of plaintiff to the following testimony by the witness John S. De Lancey, relative to the state of mind of the deceased subsequent to December 15, 1920, (at which time the transfer in issue was made):

"MR. VAN FLEET: Q. Where was that and when and who was present?

A. When he acknowledged the deeds, I don't remember the date. I was present and he says, 'John, I am now a pauper'—

MR. CARPENTER: Just a minute. If you are asking for the conversation that took place I would like to urge the objection I made formerly, that it is coming after the transfer was actually made, that it is inadmissible to show the state of mind of the testator at [147] the time the transfer was actually made.

THE COURT: The objection is overruled.

MR. CARPENTER: Exception.

MR. VAN FLEET: You may answer.

A. He says, 'I am now a pauper. I have got to

depend upon'—I forget just what he called Mrs. Mackinnon, but he was speaking of his wife,—'I have got to depend on her for anything I want from now on.'

Q. Did you have any conversation with him just before he died? A. Yes.

Q. What was that?

MR. CARPENTER: Just a minute; who was present and when did it take place?

MR. VAN FLEET: Q. Just before he died?

A. There was a nurse present; she was in and out of the room. I think the nurse was out of the room and Mrs. Mackinnon, Mrs. Pusey, now, was in and out of the room. I was talking to him. That was the morning of his death, and that is all that was present.

Q. Where was he at that time?

A. He was sitting in a chair in his room and talking to me.

Q. And did he say anything at that time about an impending demise or that he was expecting to die?

A. No; he was not feeling well, and he stated he would like to see another doctor and I told him that I would make an arrangement to take him to the city the following day, or would make an arrangement to have Dr. Moffatt of San Francisco come and see him.

MR. CARPENTER: If your Honor please, may it be stipulated that my objection—otherwise I would have made an objection to this question—that my objection to all the declarations and conversations had with the testator after the alleged transaction was made, be considered and deemed to be objections to all the rest of the line of testimony in this same case?

THE COURT: It may be so understood and an exception noted without further objection." [148]

XIV.

The court erred in overruling the objection of plaintiff to the following testimony by the witness J. M. Shannon, relative to the state of mind of the deceased subsequent to December 15, 1920, (at which time the transfer in issue was made):

"MR. VAN FLEET: Q. Did you see Mr. Mackinnon near or about the time he died; he died in January, 1921.

A. I think the last time I saw him was on the—well, as I remember, on the 24th of December.

Q. What was his condition at that time?

A. He was well with the exception of a cold that he complained of at that time.

MR. CARPENTER: Q. What time was that?

MR. VAN FLEET: Q. What date did you say that was, about?

A. Well, as I remember, it was the 24th of December.

Q. The day before Christmas? A. Yes.

Q. Did you have any conversation with him at that time with regard to his business affairs?

A. I think not; I don't remember.

Q. Did you have any conversation during that time in regard to the disposal of his property; and state about when it was and where it was?

MR. CARPENTER: If you did.

A. Previous to that, I couldn't say the exact date, but a few days—he told me he had deeded his property—

MR. CARPENTER: Just a moment. May we have the place and who was present.

THE WITNESS: It was at his home. I don't know that anyone was present; I don't recall that anyone was present.

MR. VAN FLEET: Q. Just what was that conversation?

A. He told me that he had deeded his property to Mrs. Mackinnon and he told me that he had made a deed,—he called it a blanket deed. He said his lawyers had said it was no good, but he said 'the lawyers didn't know it all,' kind of joshing." [149] To which ruling of the court the plaintiff duly and regularly excepted.

XV.

The court erred in overruling the objection of plaintiff to the following testimony by the witness William H. Mackinnon, relative to the state of mind of the deceased subsequent to December 15, 1920, (at which time the transfer in issue was made):

"MR. VAN FLEET: Q. At that time, when you saw him four days before his death, did he say anything in regard to his property?

A. He told me that he had deeded all of his real property to my mother.

Q. Just what conversation did you have with him?

MR. CARPENTER: How many days before—what day of the four days?

A. I returned on the 12th of January to my home, and after I had talked with him for possibly half an hour or so he said, 'Did you know that I had deeded

my property to your mother?' And I said, yes, I had heard about it while I was in the hospital.

MR. VAN FLEET: Q. At that time did you have any talk with him about his illness?

A. Yes, I had quite a conversation with him about his illness.

Q. What did he say, and who was present, if anyone?

A. There was no one present, as the conversation was principally with reference to my opinions of doctors, whether I thought he was ill, or not, seriously ill.

Q. State the substance of the conversation?

A. He first asked me what I thought of doctors, and I told him that my experience with doctors had not been very satisfactory, and he said, 'Well, they can make a mistake once in a while,' and I said I thought so. 'Well,' he said, 'they want me to make a trip down to Fresno.' He said, 'I am very anxious to go. Do you think you can go down with me, go next week?' That was the early part of the week when he suggested it to me. I told him I thought I could. [150] Then he said, 'Well, how do I look to you?' And I said, 'You look all right to me,' something to that effect, I can't recall any more."

To which ruling of the court the plaintiff duly and regularly excepted.

XVI.

The court erred in overruling the objection of plaintiff to the following testimony by the witness William H. Mackinnon, relative to contesting the transfer in issue:

"MR. VAN FLEET: Q. Did you contest the transfer of this property to your mother?

MR. CARPENTER: Objected to on the ground that the records of probate are the best evidence.

THE COURT: I think that is true.

MR. VAN FLEET: If your Honor please, I simply wish to show—

THE COURT: I will permit that to be answered, because it will save some time. Exception. I will permit the witness to answer, notwithstanding the records are the best evidence, unless there is some further objection to it.

MR. CARPENTER: The further objection to it that it is entirely immaterial, not within the issues of this case, whether this man contested the proceedings in the probate court, that has not got anything to do with the question of whether or not the property was transferred in contemplation of death.

THE COURT: The objection will be overruled and an exception noted.

MR. CARPENTER: Exception.

THE WITNESS: A. No, I did not."

XVII.

The District Court erred in entering judgment on the verdict herein because the evidence adduced at the [151] trial of this action was, as a matter of law, legally insufficient to sustain the verdict or judgment.

WHEREFORE, plaintiff prays that its appeal be allowed, that this assignment of errors be made a part of the record in its cause, and that upon hearing of its appeal the errors complained of be corrected and

the said judgment of October 18, 1929, may be reversed, annulled and held for naught; and further that it be adjudged and decreed that the said plaintiff and appellant have the relief prayed for in its amended complaint, and such other relief as may be proper in the premises.

(Sgd.) GEO. J. HATFIELD,
United States Attorney, Attorney for Plaintiff and Appellant.

[Endorsed]: Filed Jan. 17, 1930.

WALTER B. MALING,
Clerk. [152]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND THAT NO SUPERSEDEAS AND/OR COST BOND BE REQUIRED.

Upon reading the petition for appeal of the plaintiff and appellant herein, IT IS HEREBY ORDERED that an appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore filed and entered herein be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that no bond on this appeal, or supersedeas bond, or bond for costs

or damages shall be required to be given or filed.

Dated: January 17th, 1930.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Jan. 17, 1930.

WALTER B. MALING,
Clerk. [153]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of Said Court:
Sir:

Please prepare a transcript of the record in this case to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the appeal heretofore sued out and perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file, to-wit:

1. Original Complaint.
2. Notice of motion and motion to quash filed February 16, 1927; and affidavit of John S. Delancey and affidavit of William H. Mackinnon, Jr.
3. Minute order made on said motion to quash.
4. Notice of and motion to dismiss filed March 2, 1927;
5. Minute order made on motion to dismiss.
6. Original subpœna ad respondendum and return thereon.

7. Alias subpœna ad respondendum and return thereon.

8. Order transferring to law side.

9. Amended complaint.

10. Amended answer to amended complaint.

11. Demurrer to amended answer to amended complaint.

12. Order overruling demurrer to amended answer.

13. Verdict.

14. Judgment.

15. Petition for appeal.

16. Order allowing appeal and that no supersedeas and/or cost bond be required.

17. Assignment of errors and original citation on appeal.

18. Bill of Exceptions.

19. Stipulation and order extending time and term to file bill of exceptions (filed October 14, 1929);

20. Order of January 27, 1930, extending time to file bill of exceptions.

21. Stipulation for sending exhibits and certain moving papers and orders thereon to Circuit Court of Appeals, filed March 21, 1930.

22. This præcipe.

GEO. J. HATFIELD,
United States Attorney, Attorney for Plaintiff.

Service of the within Præcipe by copy admitted this 21st day of March, 1930.

CAREY VAN FLEET,
Attorney for Defendants.

[Endorsed]: Filed March 21, 1930.

WALTER B. MALING,
Clerk. [154]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, WALTER B. MALING, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 154 pages, numbered from 1 to 154, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the præcipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said Court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $51.75; that said amount will be charged against the United States in my next quarterly account and the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 16th day of April, A. D. 1930.

(Seal) WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [155]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America, ss:
The President of the United States of America:

To Frances Mackinnon Pusey, George G. Mackinnon, William H. Mackinnon, Jr., Frances Mackinnon Coit, and John S. Delancey, Guardian of June Mackinnon Delancey, a Minor,

Greeting:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein the United States of America is appellant, and you are appellees, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Frank H. Kerrigan, United States District Judge for the Northern District of California, this 17th day of January, A. D. 1930.

FRANK H. KERRIGAN,
United States District Judge.

Receipt of the within Citation by copy this 18th day of January, 1930.

CAREY VAN FLEET,
Attorney for Respondent.

[Endorsed]: Filed January 18, 1930.

WALTER B. MALING,
Clerk.

By R. M. Green,
Deputy Clerk. [156]

[Endorsed]: No. 6126. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Frances Mackinnon Pusey, George G. Mackinnon, William H. Mackinnon, Jr., Frances Mackinnon Coit, and John S. Delancey, Guardian of John Mackinnon Delancey, a Minor, Appellees. Transcript of the Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed April 17, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6126

United States

Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

FRANCES MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON, JR., FRANCES MACKINNON COIT and JOHN S. DELANCEY, Guardian of JOHN MACKINNON DELANCEY, a Minor,
Appellees.

Supplemental Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

The Filmer Bros. Electrotype Co., San Francisco—11—24—30—60

No. 6126

United States

Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

FRANCES MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON, JR., FRANCES MACKINNON COIT and JOHN S. DELANCEY, Guardian of JOHN MACKINNON DELANCEY, a Minor,
Appellees.

Supplemental Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

The Filmer Bros. Electrotype Co., San Francisco—11—24—30—60

INDEX TO THE SUPPLEMENTAL TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

In the Southern Division of the United States District Court for the Northern District of California.

No. 18,342—K.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANCES MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON, Jr., FRANCES MACKINNON COIT, and JOHN S. DELANCEY, Guardian of JUNE MACKINNON DELANCEY, a Minor,

Defendants.

PETITION FOR NEW TRIAL.

Comes now the plaintiff United States of America in the above-entitled action and moves the Court to set aside and vacate the verdict of the jury in said action and grant a new trial for the following reasons:

1. Errors of law occurring at the trial as follows:

(a) The Court erred in failing to instruct the jury that the counterclaim set up in defendants' answer to the amended complaint was withdrawn from their consideration.

(b) The Court erred in giving the following instruction:

"If you find from the evidence that these deeds of gift were made in good faith, and not in contemplation of death, and were intended to take effect in possession and enjoyment immediately during the lifetime of the decedent, then your verdict should be for the defendants in this case."

2. Said verdict has no evidence to sustain it.

3. Said verdict is not sustained by the evidence.

4. The great preponderance of the evidence is against the verdict. [1*]

Said petition will be presented upon the minutes of the court, upon the transcript of testimony, and upon all the pleadings, papers and records in the above-entitled cause.

The plaintiff specifies the following particulars wherein the verdict is not sustained by the evidence and which are relied upon by it in this petition for new trial:

1. That there is no evidence to show that the said claim was presented to the Treasury Department prior to the trial and no evidence that the defendants did not have time to present said claim to the Treasury Department and obtain a ruling on same prior to trial.

2. That there is no evidence of any conversation with the deceased at or near the time that the said transfers were made which would tend to show the deceased's intention; and no evidence of the demeanor of the deceased at or near the time said

*Page-number appearing at the foot of page of original certified Supplemental Transcript of Record.

transfers were made which would tend to show the intention of the said deceased William H. Mackinnon in regard to the said transfers.

3. The evidence shows that the value of the whole estate less deductible expenses amounting to $496,496.24 and that the value placed upon said transfers by the Commissioner of Internal Revenue was $387,968.93. Since the tax on the net estate with the said transfers included in the net estate would amount to $13,359.85, and since the tax on said estate with the said transfers excluded from the said net estate would amount to $670.55, it is plain to be seen that the verdict of the jury was not sustained by the evidence to the extent of $670.55 plus seven per cent interest thereon from the 2d day of November, 1925; and the jury therefore should have at least returned a verdict in favor of plaintiff for the latter amount. [2]

WHEREFORE, your petitioner prays that the judgment and verdict be set aside and a new trial granted.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Plaintiff. [3]

[Title of Court and Cause.]

POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR NEW TRIAL.

Petition for new trial lies in federal practice and can be made upon the following grounds:

1. Court erred in stating the law;
2. Verdict not sustained by the evidence;
3. Verdict has no evidence to sustain it;
4. Great preponderance of evidence is against the verdict;
5. Verdict due to passion, prejudice, or partisan feeling.

Pringle vs. Guild, 119 Fed. 962.

Murhard vs. Portland Company, 163 Fed. 194.

Nor is motion for new trial in the federal courts affected by the Conformity Statute, 28 U. S. C. 391, note 2.

I.

(a) FAILURE TO INSTRUCT THE JURY THAT COUNTERCLAIM HAD BEEN WITHDRAWN FROM THEIR CONSIDERATION:

This is an action for debt to recover public moneys and is not an action to recover taxes. [4]

United States vs. Lora Pratt Kelly, 30 Fed. (2d) 193.

Therefore, Section 951 Revised Statutes (28 U. S. C. 774), applies. This section reads as follows:

"In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of

the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or by some unavoidable accident."

Defendants' failure in the first instance to allege that the condition precedent (presenting claim for allowance) had been complied with and their failure to ultimately prove that the said counterclaim had been presented to the Treasury Department deprives the defendants of the right to have the jury consider the said counterclaim.

That an allegation of presentation of the claim is requisite in order to state a cause of action on counterclaim is supported by the decision in

United States vs. Patterson, 91 Fed. 854,

where the Court said at page 855:

"The claim made by the defendant, whether called 'credit' or 'set-off,' should be so stated in the pleading as that the claim is, on the face of the pleading, provable. Under the statute quoted, the claim is provable only when proper presentation has been made, and disallowance in whole or in part followed. Therefore the claim is not properly pleaded, unless such presentation and disallowance are also pleaded. The statute quoted has frequently been before the courts for construction and application. U. S. vs. Giles, (1815) 9 Cranch, 212, 236; Walton vs. U. S., (1824) 9 Wheat. 651, 653; Watkins vs. U. S., (1869) 9 Wall. 759, 765; Halliburton vs.

[5] U. S., (1871) 13 Wall. 63, 65; Railroad Co. vs. U. S., (1879) 101 U. S. 543, 548,—are cases wherein the provisions above quoted (of Section 951, Rev. St.), or similar provisions, have been under consideration and sustained by the supreme court."

Therefore, defendants' counterclaim does not state a cause of action.

Any offer of proof of the presentation of said claim to the Treasury Department could have been objected to when made on the ground that there was no allegation in defendants' pleading to support defendants' proof thereunder. But in this case the objection was unnecessary because defendants failed to make any offer for the good reason that they had no evidence of any presentation of the said claim. No evidence appearing to show that a presentation of the claim as required by the section had been made, the proof offered in support of the contention made in the counterclaim should have been excluded and the counterclaim withdrawn from the consideration of the jury.

United States vs. Gilmore, 74 U. S. 491.

There the Court said, at page 494:

"When the defendants failed to produce the evidence necessary to warrant the introduction of such testimony, *all which* had been given should have been excluded and the claims withdrawn from the consideration of the jury. To allow them to remain in the case was an error,

and any instruction given afterwards, short of their withdrawal, was unavailing to cure it."

(b) THE INSTRUCTION SET FORTH IN HAEC VERBA WOULD LEAD THE JURY TO BELIEVE THAT THERE WAS AN ISSUE AS TO WHETHER THE GIFT WAS MADE IN "GOOD FAITH" AND AN ISSUE ON WHEN THE GIFT WAS INTENDED TO TAKE EFFECT.

These issues did not enter into the trial of this case. The Revenue Act of 1918, Section 401, provides for the [6] amount of tax upon the net estate of every decedent. Section 402 (c) provides that there shall be included in the gross estate among other named interests of the deceased, the following:

> "To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act), except in case of a *bona fide* sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been

made in contemplation of death within the meaning of this title."

It will be seen that "good faith" does not enter the issues by force of the statute. Furthermore, the pleadings do not raise the issue of good faith.

Nor was there any issue in the trial of this action on the time when the transfer was intended to take effect in possession or enjoyment. The record shows that there was never any issue on either this point or on the point that a fair consideration in money or money's worth was given in exchange for the transfer. The opening statement of counsel for both sides, we believe, will show that it was admitted that an outright gift was made by William H. Mackinnon to his wife of a material part of his property thirty days prior to his death, and that it was at all times purely a gift and it was not a transaction of sale supported by a consideration in money or money's worth. The plaintiff therefore feels that this instruction was erroneous and that the giving of it prevented the plaintiff from having a fair trial. [7]

Counsel not having the reporter's transcript covering the last day's proceedings at hand in the preparation of this motion, we are unable at the present time to ascertain whether a motion was made to exclude the evidence on counterclaim and whether an exception was preserved. Counsel does, however, remember of making a motion for directed verdict on the counterclaim; but whether the request was made or an exception taken does not make any difference because the trial court may in the exer-

cise of its judicial discretion grant a new trial if convinced that its charge was wrong, even though its attention was not called to the error complained of before the case was finally submitted to the jury.

Railway Company vs. Heck, 102 U. S. 120

II.

NO EVIDENCE TO SUSTAIN THE VERDICT.

Without proof of presentation, this being an action for debt and not for taxes, defendants have not proved facts sufficient to sustain the verdict

United States vs. Patterson, 91 Fed. 854.

United States vs. Gilmore, 74 U. S. 491.

Although the defendants were given the greatest of latitude by the rulings of the Court in the admission of evidence as to all the conversations as will be seen by the ruling of the Court in

Kyle vs. Craig, 125 Cal. 107, 113,

they have not introduced one iota of proof tending to show Mr. Mackinnon's intention at the time that he made the transfers.

III.

SAID VERDICT IS NOT SUSTAINED BY THE EVIDENCE.

(a) United States vs. Patterson, 91 Fed. 854.

United States vs. Gilmore, 74 U. S. 491. [8]

(b) Revenue Act 1918, sec. 401, sec. 403, subd. 4.

(c) The most that the evidence shows is that the deceased intended for some time to transfer his property to his wife, and that on Christmas Day he joined in the usual Christmas Day celebration,

carved the turkey and served the champagne, and that although confined to his room for the last two weeks of his life, that he was sitting up every day. There is absolutely no evidence of any conversation had with the deceased at or near the time of the transfer, nor is there any evidence aside from what has been mentioned here of any demeanor or conduct upon his part that would lend any aid in determining what the intention of the deceased was at the time that he made the transfer. No one was present other than his wife at the time that he handed her the deeds. She testified (Tr. 25) that there was no conversation other than, "Here —— (wife) take these; these are yours." The mere fact that he was everlastingly speaking of taking trips certainly has no bearing on whether the deceased at the time that he handed the deeds to his wife did not contemplate death in the reasonably near distant future. Therefore, giving the evidence the best possible view to support defendants' contention the proof fails to overcome the presumption that the transfer was made in contemplation of death.

IV.

PREPONDERANCE OF EVIDENCE AGAINST THE VERDICT.

In addition to the presumption, the admissions of the defendants' witnesses show that the deceased was not feeling well at the time the transfers were made (Tr. 88, 26); that the deceased had been suffering with chronic colds for the few months next preceding his death (Tr. 90); that his legs were

swollen (Tr. 90, 95), and that doctors were called in [9] within a few days after the transfer was made (Tr. 84, 71, 26). The evidence shows further that William H. Mackinnon was 63 years 11 months at the date of his death, that he was 5 feet 10½ inches tall and weighed in the neighborhood of 300 pounds (Tr. 18, 23); he was a retired business man; he was a man who never ever complained to anybody about his health (Tr. 17, 43, 74, 88).

The evidence shows further that he closed his bank account and transferred to his wife $387,968.93 in real property out of a total estate of $496,496.24 less than one month prior to his death from heart trouble (Tr. 89, 76); that he told his attorney after the transfer was made that he was a "pauper" now (Tr. 32); that he incidentally called his son-in-law attorney to his home in order to give him instructions for drawing the deeds, ordering the attorney to draw them up and bring them back to the house instead of taking care of the matter on one of his trips to the office where he would have found the son-in-law who was sharing the office with Mr. Mackinnon. Instead, it seemed to be a rush proposition up until the deeds were actually made out and handed to the wife.

Thereafter, we have a man who seemed to be pleased with himself to the same extent as if he had just recently executed his will after worrying about it for some time and in the same fashion we find him advising the respective members of the family that he had just given all of his property to the mother. It would be easy to expect the same in-

formation to be imparted to the children had he just designated his wife as sole beneficiary of all of said property in a recently executed will. [10]

This evidence introduced by the defendants, instead of overcoming the presumption, shows most convincingly that the legal presumption should prevail in this case.

Service of the within notice by copy admitted this 16th day of Oct., 1929.

CAREY VAN FLEET,
Attorney for Defts.

[Endorsed]: Filed Oct. 16, 1929. [11]

At a stated term of the Southern Division of the United States District Court for the Northern District of California held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 18th day of October, in the year of our Lord one thousand nine hundred and twenty-nine. Present: The Honorable FRANK H. NORCROSS, District Judge.

[Title of Court and Cause.]

MINUTES OF COURT—OCTOBER 18, 1929—ORDER DENYING MOTION FOR NEW TRIAL.

This case came on regularly this day for hearing of plaintiff's motion for a new trial of the issues

herein, and after being argued by counsel for respective parties, the Court ORDERED that said motion be and the same is hereby denied. [12]

[Title of Court and Cause.]

PRAECIPE FOR SUPPLEMENTAL TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please prepare certified stenographic supplemental transcript of record on appeal herein as follows:

(1) Petition for new trial.

(2) Order denying new trial.

Service of the within praecipe by copy admitted this 1st day of Nov., 1930.

CAREY VAN FLEET,
Attorney for ————.
GEO. J. HATFIELD.
GEO. J. HATFIELD,
United States Attorney,
By CHELLIS M. CARPENTER,
CHELLIS M. CARPENTER,
Asst. United States Attorney,
(Attorneys for Plaintiff.)

[Endorsed]: Filed Nov. 1, 1930. [13]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO SUPPLEMENTAL TRANSCRIPT OF RECORD.

United States of America,
Northern District of California,—ss.

I, Walter B. Maling, Clerk of the United States District Court in and for the Northern District of California, do hereby certify that the foregoing is a true and full copy of the original petition for a new trial filed Oct. 16, 1929, order denying new trial, dated Oct. 18, 1929, and praecipe for additional record on appeal, filed Nov. 1, 1930, in the cause entitled United States of America vs. Frances Mackinnon Pusey et al., No. 18,342—K. as the same remains of record and on file in the office of the Clerk of said court.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid court at San Francisco, this 5th day of November, A. D. 1930.

[Seal] WALTER B. MALING,
Clerk.

By ————————,
Deputy Clerk. [14]

[Endorsed]: No. 6126. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Frances Mackinnon Pusey, George G. Mackinnon, William H.

Mackinnon, Jr., Frances Mackinnon Coit and John S. Delancey, Guardian of John Mackinnon Delancey, a Minor, Appellees. Supplemental Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed November 5, 1930.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6126

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

FRANCES MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON, JR., FRANCES MACKINNON COIT and JOHN S. DELANUEY, Guardian of JOHN MACKINNON DELANCEY, a Minor,
Appellees.

BRIEF FOR APPELLANT

GEORGE J. HATFIELD,
United States Attorney,

CHELLIS M. CARPENTER,
Asst. United States Attorney,

Attorneys for Appellant.

Neal, Stratford & Neer & P.

SUBJECT INDEX

PRELIMINARY

THE MERITS

TABLE OF AUTHORITIES CITED

No. 6126

IN THE

United States Circuit Court of Appeals

FOR THE

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UNITED STATES OF AMERICA,
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vs.

FRANCES MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON, JR., FRANCES MACKINNON COIT and JOHN S. DELANCEY, Guardian of JOHN MACKINNON DELANCEY, a Minor,
Appellees.

APPELLANT'S MOTION TO STRIKE BILL OF EXCEPTIONS

This is an appeal by the United States, plaintiff below, from a judgment of the District Court entered on October 10, 1929 [R. 55].

FACTS

After the appeal was taken and after the record on appeal was filed, appellee moved to strike the bill of exceptions from the record herein on the ground that it was not signed, settled, allowed, or filed within the

time allowed by law. (Similar motions were made in the trial court [R. 138-147]).

The July 1929 term of court was extended to *March 1, 1930,* by two court orders; the first order, which was signed and filed four days after judgment, extended the term to January 29, 1930 [R. 56]; the second and final order [R. 57], was signed and filed on January 27, 1930, two days before the time set by the first order for the expiration of the trial term.

The time within which to serve and file plaintiff's bill of exceptions was also extended by said orders to February 20, 1930, the first order extending the time to January 29, 1930 [R. 57].

Plaintiff's proposed bill was served and lodged on *February 8, 1930* [R. 136]. It was settled and allowed by the trial Judge on *February 28, 1930* [R. 135], which was within that portion of the July term which was created by the second order.

Hearing on appellee's motion by this Court was had on May 12, 1930, at which time the matter was submitted for decision. Thereafter this Court ordered the submission set aside and the matter continued to the time of hearing of the cause on appeal herein.

QUESTION

Was the second order of the trial Judge made January 27, 1930, valid for the purpose of extending the July 1929 term? If it was, the bill of exceptions was admittedly filed within the time and term allowed by law.

STATUTES AND RULES

By Statute (28 USC 145) the July term of Court commences the second Monday in July and the next succeeding term commences the first Monday in November. Rule 9 of the Rules of Practice for the United States District Court for the Northern District of California (Rules of January 1, 1912, as amended), provided:

> "For the purpose of making and filing bills of exceptions and of making any and all motions necessary to be made within the term at which any judgment or decree is entered, each term of this Court shall be and hereby is extended so as to comprise a period of three calendar months beginning on the first Tuesday of the month in which verdict is rendered or judgment or decree entered."

Rule 8 of the present Rules (effective July 1, 1928), superseded the above rule, and provides:

> "For the purpose of making and filing bills of exceptions and of making any and all motions in connection therewith, together with motions for new trials and petitions for rehearings, each term of this Court shall be and hereby is extended so as to comprise a period of three calendar months beginning on the date on which verdict is rendered or judgment or decree entered."

Rule 32 provides, so far as material, that when an act is to be done relating to the preparation of bills of exceptions, the time allowed by these rules may, unless otherwise specially provided, be extended by the court or judge by order made before the expiration of such time, but that no such extension or extensions shall exceed thirty days in all without the consent of the adverse party.

Rule 45, so far as material, provides that the time within which the bill and amendments are required to be served and filed may be extended by order of court.

ARGUMENT

A statutory term of court once commenced continues until the beginning of the next term, unless finally adjourned in the meantime.

Harlan v. McGourin, 218 U. S. 442, 450.

The rule that a federal court has power to extend its terms for specified times, is too well settled to require the citation of authority.

Maison v. Arnold, 16 F. (2d) 977 (certiorari denied 273 U. S. 766).

A statutory term of court may be extended (1) by standing order; or (2) by *special order made during* the judgment term and *any valid extension thereof.*

Great Northern Ins. Co. v. Dixon (CCA-8), 22 F. (2d) 655, 657;
Cudahy Packing Co. v. City of Omaha (CCA-8), 24 F. (2d) 3, 6;
Stickel v. U. S. (CCA-8), 294 Fed. 808, 810;
Exporters v. Butterworth Co., 258 U. S. 365, 368.
In Re Bills of Exception (CCA-6), 37 F. (2d) 849, 852.

Counsel, we believe, has misconstrued the decision in the case of *O'Connell v. U. S.,* 253 U. S. 145 (affirming this circuit).

This has, no doubt, been caused by loose language used by the Eighth Circuit in the Cudahy and Stickel cases (supra). It says in the Stickel case, page 810:

"The orders of extension held to be beyond the jurisdiction of the trial court in some of those

> cases were made after the expiration of the times limited by general rules for making such extensions, as in the O'Connell Case, or after the expiration of the terms of court and of the extensions lawfully granted."

And in the Cudahy case, at page 6:

> "Counsel evidently rely upon the principle announced by the Ninth Circuit in Anderson et al. v. United States (C.C.A.) 269 F. 65: 'After the expiration of the term at which a judgment was rendered and of any extended time allowed by rule of court for settling a bill of exceptions, the court is without jurisdiction to grant any further extension of time, and such jurisdiction cannot be conferred by consent of counsel'—citing, among other cases, O'Connell v. United States, 253 U. S. 142, 40 S. Ct. 444, 64 L. Ed. 827."

The O'Connell case does not hold, as it may seem from the above quoted language, that the court cannot extend its term by order made within that term to a time beyond the time specified in a standing rule. Nor does the Anderson case.

In each of these cases no order extending term was made and the question of the power of the Court to make such an order, in or out of term, was not raised.

The only orders under consideration in the O'Connell and Anderson cases were orders extending time to file bill of exceptions. In each, the first of the series of orders was not made until after the trial term had expired. In neither case did the court hold that former Rule 9 (supra), operated, so far as bills of exceptions were concerned, as anything more than a standing rule of final adjuornment of the term.

Had the Eighth Circuit in the Stickel and Cudahy cases carefully analyzed the holdings of the Ninth Circuit in the cases referred to, the decisions in the Stickel and Cudahy cases would have been quite like the decision by the Eighth Circuit in *Great Northern Ins. v. Dixon* (supra).

In conclusion we submit that, providing the Court makes its special order (extending term) within the time prescribed by Rule 9 (now Rule 8), it may thereafter at any time within the term as extended either by said special order or by a subsequent order (made within the time prescribed by the first order),—settle the bill of exceptions.

That it may do so in spite of a rule, such as rule 32, supra, is well settled.

Cavana v. Addison (CCA-9), 18 F. (2d) 278, 279, and cases there cited.

THE APPEAL

FACTS

The original complaint and bill in equity [R. 2] discloses that the United States, having collected from the estate of William H. Mackinnon, who died January 16, 1921, the sum of $13,359.85 as an estate tax thereon, erroneously refunded to the defendants, the sole legatees of the deceased, the sum of $11,287.10 ($1,848.44 of which was interest), on the erroneous theory that only one-half of the community property in said estate was taxable. The United States sought by this bill to establish a lien on the distributive share of said legatees

for the repayment of said sum. After trial and submission, but before decision thereon, the court pursuant to the decision in *Kelly v. U. S.* (CCA-9), 30 F. (2d) 193, made its order transferring the cause to the law side of the court; whereupon plaintiff filed an amended complaint [R. 33] and defendants answered [R. 42] counterclaiming [R. 44] for the amount of tax claimed by and paid to the government from said estate upon a certain transfer of property made by decedent in his lifetime to his wife which defendants claimed was not made in contemplation of death. The exact amount of said counterclaim is not stated therein but may be readily determined by taking the difference between the Commissioner's value of the net estate ($454,689.12) [R. 39 and 40] and the alleged value of the transferred property ($368,376.00) [R. 44], and applying § 401 of the Revenue Act of 1918 (40 Stat. 1057), the result is $12,133.59 or $846.49 more than the amount claimed by plaintiff. Plaintiff demurred [R. 48] to this counterclaim and the demurrer was overruled at the time of trial [R. 60], and the cause was tried before a jury resulting in a verdict [R. 53] for defendants. Upon this verdict judgment [R. 54] was entered. The trial court held that plaintiff was entitled to recover upon its cause of action and directed the jury to find for plaintiff unless they found that defendants had proved their counterclaim [R. 129]. The questions raised herein relate solely to the counterclaim and the subject matter upon which it is founded.

SPECIFICATIONS OF ERROR RELIED UPON

Plaintiff in error at the time of the allowance of the appeal filed assignments of error, seventeen in number [R. 148]. It hereby specifies as the errors upon which it will rely and urge upon hearing of the said appeal, the following:

> "I. The counterclaim set forth in defendants' amended answer to plaintiff's amended complaint, does not state facts sufficient to constitute a counterclaim."
>
> "III. The court erred in overruling the demurrer interposed by the plaintiff to the first, further and separate defense and counterclaim which defendants have attempted to set forth on pages 3 and 4 of the amended answer to plaintiff's amended complaint."
>
> "II. That the court has no jurisdiction of the subject matter of the claim set forth in defendants' amended answer to plaintiff's amended complaint as a counterclaim."
>
> "V. The court erred in denying plaintiff's motion for a directed verdict on defendants' counterclaim upon the ground that the evidence in the case thereon had not established a prima facie case on counterclaim and was legally insufficient to sustain a verdict for the reason that no evidence was introduced showing that the claim set forth in said counterclaim was ever presented to the accounting officers of the Treasury as required by Section 951 Revised Statutes (28 USC 774), and no evidence was offered to show that the defendants, or any of them, were, at the time of the trial, in possession of vouchers or other documents not before in their power to procure, and/or were prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or for any other cause whatsoever; to which ruling of the court plaintiff duly and regularly excepted at the time of the trial herein."

"VI. The Court erred in denying plaintiff's motion for a directed verdict at the close of all the evidence in said cause on plaintiff's cause of action for money had and received, on the ground that the evidence in this cause was such, as a matter of law, to entitle plaintiff to a verdict thereon; to which ruling of the court plaintiff duly and regularly excepted at the time of the trial herein."

"VII. The court erred in giving the last portion of the following instruction:

'You are instructed that the total gross estate of the said William H. Mackinnon was subject to the estate tax, and that the refund payments were occasioned by a mistake of law, and that the plaintiff is entitled to recover such payments from the defendant, Frances Mackinnon Pusey as money had and received, unless you find from the evidence that the defendants have established their alleged separate defense and counterclaim as set up in their amended answer.'

beginning with the words, 'unless you find' and reading as follows:

'unless you find from the evidence that the defendants have established their alleged separate defense and counterclaim as set up in their amended answer.'

To which the plaintiff duly and regularly excepted at the time of the trial herein."

STATUTES INVOLVED

Revised Statutes § 951 (28 USC 774):

"In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers

not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or by some unavoidable accident."

THE QUESTIONS

Assignments Nos. I and III have to do with error appearing on the face of the record.

The United States demurrered to the answer on the ground that the claim does not state facts sufficient to constitute a cause of counterclaim against it, explaining that there was no allegation that the claim on which the counter-claim was based was ever presented to the Treasury Department as required by revised statutes § 951, (supra). The question is: Does § 951 make an allegation of presentment or allegations of matters to bring the claim within one of the statutory exceptions, a condition precedent to the right to counter-claim.

Assignments Nos. II, V, VI, and VII relate to jurisdiction of the subject matter of the action. The question is—Are defendants required to prove at the trial, in order to prevail in offsetting against the United States Government's claim, that their claim in offset was presented to the accounting officers of the Treasury and disallowed or that the facts necessary to bring it within the statutory exceptions exist. It may be otherwise stated thus: Has the court in the absence of such proof, jurisdiction of the subject matter of the counterclaim?

ARGUMENT

I.

NO RIGHT OF SET-OFF AT COMMON LAW

In *Hall v. United States,* 91 U. S. 559, Mr. Chief Justice Waite said, at page 652:

> "Defendant litigants had no right to file accounts in set-off at common law. * * * Questions of the kind, where the United States are plaintiffs, must be determined wholly by the acts of Congress, as the local laws have no application in such cases."

U. S. v. Robeson, 34 U. S. 319;
Watkins v. U. S., 76 U. S. 759.

REVISED STATUTES SECTION 951, CREATED ONLY A CONDITIONAL RIGHT

In *Western Union Rwy. Company v. U. S.,* 101 U. S. 543, the action was by the United States against a corporation of Wisconsin to recover certain Internal Revenue taxes. The defendant filed a general denial and in addition set up a counterclaim setting forth a claim for credit of several thousand dollars on account of taxes claimed to have been erroneously assessed. No demurrer was interposed to the counterclaim and no objection to the offer of evidence tending to prove that the defendant was entitled to credit was made. The District Court disallowed the claim. Mr. Chief Justice Waite for the Supreme Court stated, at page 548:

> "It does not appear that this claim was ever presented to the accounting officers of the treasury for allowance, on appeal or otherwise, or that it has ever been disallowed. For this reason notwithstanding its apparent equity, the credit was properly refused in this suit."

Yates v. U. S. (CCA-9), 90 Fed. 57;
U. S. v. Cantrell (DC Ore.) 176 Fed. 503.

PLEADER MUST ALLEGE FACTS ENTITLING HIM TO COUNTERCLAIM AGAINST THE UNITED STATES

In *United States v. Patterson* (CC Iowa) 91 Fed. 854, the Court said, at page 855:

> "The claim made by the defendant, whether called 'credit' or 'set-off,' should be so stated in the pleading as that the claim thereby is, on the face of the pleading, provable. Under the statute quoted, the claim is provable only when proper presentation has been made and disallowance in whole or in part followed. Therefore the claim is not properly pleaded unless such presentation and disallowance are also pleaded."

The counterclaim in the present action contains no allegation of presentation or disallowance nor does it contain allegations of matters tending to bring it within any one of the statutory exceptions. It is respectfully submitted that the counterclaim because of the omission of such allegations, does not state a cause of action on counterclaim in the present suit, and plaintiff's demurrer should therefore have been sustained.

II.

THE DISTRICT COURT HAD NO JURISDICTION OF THE SUBJECT MATTER OF THE COUNTERCLAIM

We submit that the question of jurisdiction over the subject matter of the action may be raised by objection at any time; by demurrer, if the defect is disclosed on the face of the petition; by motion for non-suit or directed verdict at the trial; or even for the first time on appeal.

Litigants in the absence of statutory consent, have no more right to off-set a claim against the sovereign in a

suit brought by it than have original suitors to sue the sovereign, *Hall v. U. S.* (supra). In the absence of consent by the sovereign, there is an absence of power in the court to subject the sovereign to judgments and decrees. The sovereign may therefore appear generally, defend the action on the merits and succesfully raise the jurisdictional question at any time.

Hill v. U. S., 50 U. S. 386;
Oregon v. Hitchcock, 202 U. S. 60;
Naganab v. Hitchcock, 202 U. S. 473;
New Mexico v. Lane, 243 U. S. 52;
Schillinger v. U. S., 115 U. S. 163.

On the other hand, the sovereign may consent to suit. But only the legislative body can give consent; the executive or his agents cannot bind the sovereign.

> "As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it." Marshall, C. J. in *U. S. v. Clarke,* 33 U. S. 436 (1854).

Carr v. U. S., 98 U. S. 433 (1879);
Stanley v. Schwalby, 162 U. S. 255 (1895).

See also recent decision in

Candee v. U. S. (CCA-9), No. 6036.

Furthermore, where consent is given, it may be taken away at the will of the Legislature, even after action has been brought.

Beers v. Arkansas, 61 U. S. 527 (1857).

The act of Congress under consideration here (§ 951 R. S.) expresses a conditional consent. Jurisdiction is conferred upon the courts to subject the United States

to judgment on counterclaim only in the event that defendants first present to the accounting officers of the Treasury or failing that, first show a sufficient statutory excuse. The plain meaning of the statute must be that where there is no compliance with the condition, there is no consent which would permit the defendant to counterclaim.

Western Union R. Co. v. U. S. (supra).

In the case at bar, defendants offer no evidence tending to prove compliance with the condition or tending to show that their claim comes within one of the statutory exceptions.

It therefore follows inevitably that appellants are praying for judgments against the sovereign in a situation where there is, in fact, no consent at all. As is said in *Rock Island etc. v. U. S.,* 254 U. S. 141 (1924):

> "Men must turn square corners when they deal with the government, and if it attaches even purely formal condition to its consent to be sued those conditions must be complied with. * * * At all events the words are there in the statute and the regulations and the court is of the opinion that they mark the conditions of the claimant's right."

The District Court had, therefore, no jurisdiction of the subject matter of the counterclaim.

CONCLUSION

From a consideration of the authorities with respect to the instant case in hearing, the plaintiff in error summarizes: That as against general demurrer the condition required by Revised Statutes § 951, must be alleged; that consequently it was error for the Court to overrule plaintiff's demurrer to said counterclaim; that in the absence of proof of compliance on the part of the defendants with the condition precedent the Court had no jurisdiction of the claim and the Court for this reason, erred in not instructing the jury to find for plaintiff. The judgment should be reversed.

Respectfully submitted,

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